

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

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CAROL ROSENBERG	:	Index No.	_____
5825 Collins Ave 5K	:		
Miami Beach, FL 33140	:		
	:		
Plaintiff,	:		
	:		
- against -	:		
	:	COMPLAINT	
UNITED STATES DEPARTMENT OF	:		
DEFENSE,	:		
1400 Defense Pentagon	:		
Washington, DC 20301-1400	:		
	:		
Defendant.	:		
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Plaintiff, Carol Rosenberg, by her undersigned attorney, alleges:

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, brought by a reporter for *The Miami Herald* to compel access to a single record believed to be held by a single office in the Department of Defense (“DOD”): a list of names.

2. In December 2012, in the course of investigating a breaking news story concerning Guantanamo Bay detainees, Plaintiff submitted a FOIA request to DOD seeking a list of the names of the Guantanamo detainees whose status in a November 2012 GAO report is listed as “Continued Detention under the AUMF.” Plaintiff requested that DOD grant expedited processing of the request given its timely news value and importance.

3. Not only did DOD refuse to grant expedited processing of Plaintiff’s FOIA request, DOD still hasn’t provided the single record Plaintiff seeks. Nor has DOD processed Plaintiff’s timely administrative appeal of its refusal to grant expedited processing and

failure to timely disclose the record Plaintiff seeks. In defense of its delay, DOD has offered only empty bromides—that the record facility is geographically separated from the DOD office with which Plaintiff filed her FOIA request and that it has a need to consult with other DOD components.

4. Given the significant public interest in understanding and resolving the questions concerning the propriety of the detentions of hundreds of individuals at Guantanamo Bay, Plaintiff seeks declaratory, injunctive, and other relief to enforce her statutory right to inspect the names of the Guantanamo detainees whose status in the 2012 GAO report is “Continued Detention under the AUMF.” Plaintiff seeks expeditious treatment of this Complaint pursuant to 28 U.S.C. § 1657.

THE PARTIES

5. Plaintiff Carol Rosenberg is a reporter for *The Miami Herald*. Plaintiff has been a staff reporter for *The Miami Herald* since September 1, 1990 and is *The Miami Herald*’s primary reporter of news concerning Guantanamo Bay, covering detainee issues related to Guantanamo Bay since December 2001.

6. Defendant Department of Defense is a department within the executive branch of the United States government. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06.

8. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

FACTS

The Guantanamo Bay Detention Controversy Underlying Plaintiff's FOIA Request

9. The United States has detained hundreds of people at a naval base in Guantanamo Bay, Cuba since January 2002.

10. On January 22, 2009, President Obama issued Executive Order 13492, calling for an interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009). (A true and correct copy of Executive Order 13,492 is annexed as Exhibit A.)

11. A year later, on January 22, 2010, the Guantanamo Review Task Force published the review entitled "Final Report." Dep't of Justice, *Final Report: Guantanamo Review Task Force (2010)*, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. (A true and correct copy of this report is annexed as Exhibit B.) In that report, the Task Force acknowledged that 48 Guantanamo detainees were approved for continued detention under the AUMF. *Id.* at 10.

12. In November 2012, the United States Government Accountability Office ("GAO report") issued a report entitled "Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States," revealing that the population of detainees under the status "Continued Detention under the AUMF" had shrunk to 46 individuals. U.S. Gov't Accountability Office, GAO-13-31, *Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States* 9 (2012), available at <http://www.gao.gov/assets/660/650032.pdf>. (A true and correct copy of this report is annexed as Exhibit C.)

13. On information and belief, the names of these 46 detainees are not classified. On September 21, 2012, the names of 55 detainees later mentioned alongside the 46 AUMF detainees in the November GAO report were made public in a court filing that appeared in a case in the U.S. Federal District Court for the District of Columbia, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) suggesting that the names of the 46 AUMF detainees are also not classified. *See* Current Guantanamo Bay Detainee-Petitioners Approved for Transfer (Sept. 21, 2012), *Boumediene v. Bush*, (D.D.C.) (Doc. No. 314-2), *available at* <http://media.miamiherald.com/smedia/2012/09/21/17/22/1dquzf.S0.56.pdf>. (A true and correct copy of this filing is annexed as Exhibit D.); *see also* Carol Rosenberg, *U.S. Names 55 Guantánamo Captives Cleared for Release*, Miami Herald, Sept. 21, 2012, <http://www.miamiherald.com/2012/09/21/3014519/us-names-55-guantanamo-captives.html> (reporting on the release of the names of 55 detainees). (A true and correct copy of this article is annexed as Exhibit E.)

14. Due to the lack of documentation provided by the Government, Plaintiff has been unable to report the names of the Guantanamo detainees who are not subject to prosecution but who the Obama administration refuses to release—information unquestionably of great interest to the public.

15. On information and belief, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy William K. Lietzau’s office serves as the repository of the records related to the identities of the Guantanamo detainees.

Plaintiff’s Efforts to Obtain the Names of the Guantanamo Detainees Whose Status is Listed as “Continued Detention under the AUMF” in the November 2012 GAO Report

16. On December 31, 2012, Plaintiff submitted a FOIA request by letter to DOD seeking:

Records sufficient to disclose the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as ‘Continued Detention under the AUMF’ in the November 2012 GAO report.

(A true and correct copy of this request is annexed as Exhibit F.)

17. In her request, Plaintiff stressed that these records were “time sensitive” and were sought in order to produce a report on a “breaking story [that] has generated wide public interest.” Moreover, Plaintiff stressed the importance of reporting on this matter quickly so that the public can engage with their newly-elected government on the underlying policy issues involved. Plaintiff requested that DOD expedite its treatment of the FOIA request, communicate any questions concerning her request by email, and notify her if any documents responsive to her request are classified. Ex. F at 3-4.

18. By e-mail dated January 7, 2013, defendant DOD informed Plaintiff that it had denied her request for expedited processing. In the same e-mail, DOD informed Plaintiff that it would be “unable to respond to your request within the FOIA’s 20 day statutory time period as there are unusual circumstances which impact on our ability to quickly process your request. These unusual circumstances are: (a) the need to search for and collect records from a facility geographically separated from this Office and (b) the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records.” The e-mail did not enclose any responsive documents or indicate when responsive documents might be expected. (A true and correct copy of defendant’s initial response to Plaintiff’s request is annexed as Exhibit G.)

19. By e-mail and letter dated January 16, 2013, Plaintiff, by counsel, wrote to Michael Bowers, the DOD FOIA officer handling Plaintiff’s Request. In that letter, Ms. Rosenberg appealed DOD’s refusal to expedite her request and objected to Mr. Bowers’

indication that the DOD would not respond within the statutory deadline. (A true and correct copy of this letter is annexed as Exhibit H.)

20. On January 28, 2013, DOD FOIA officer Michael Bowers responded by email advising that although DOD denied Plaintiff's request for expedited processing, the DOD has initiated a search for responsive records. Mr. Bowers also reiterated that "there are unusual circumstances which impact our ability to quickly process the request - the records facility is geographically separated from this Office, and, the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records." (A true and correct copy of DOD's response to Plaintiff's email objecting to DOD's refusal to grant her request expedited processing is annexed as Exhibit I.)

21. Between December 31, 2012 and February 4, 2013, DOD produced no records to Plaintiff nor claimed any FOIA exemptions for withholding the requested records. Accordingly, on February 5, 2013, Plaintiff, by counsel, submitted to DOD, by certified Priority Mail, her appeal of the constructive denial of Plaintiff's request. Plaintiff expressly requested expedited treatment of the appeal, explaining that she sought the record in connection with her reporting of a continuing news story of great public interest. (A true and correct copy of Plaintiff's administrative appeal is annexed as Exhibit J.)

22. On March 7, Plaintiff's counsel received a letter from DOD's Defense Freedom of Information Policy Office, postmarked February 1, 2013. The letter states that it is "in response to [Plaintiff's] January 16, 2013, Freedom of Information Act (FOIA) appeal that was received in this office on January 25, 2013." DOD writes, "Due to an extremely heavy FOIA workload, we are unable to complete your appeal within the statutory time requirement. . . . When the appellate review of your case is complete, you will be notified by the appellate

authority, the Deputy Director of Administration and Management, Office of the Secretary of Defense, of the final decision.” (A true and correct copy of DOD’s letter is annexed as Exhibit K.)

23. The Freedom of Information Act requires agencies to “make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.” 5 U.S.C. § 552(a)(6)(A)(ii). More than twenty days have passed since Plaintiff submitted her February 5, 2013 administrative appeal to DOD. Plaintiff has received no further response to her appeal.

24. Plaintiff has exhausted her administrative remedies.

FIRST CAUSE OF ACTION
(Violation of FOIA for failing to expedite Plaintiff’s request)

25. Plaintiff repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

26. Defendant’s refusal to expedite the processing of Plaintiff’s request and Plaintiff’s appeal violates FOIA, 5 U.S.C. § 552(a)(6)(E), and defendant’s own regulations promulgated thereunder.

SECOND CAUSE OF ACTION
(Violation of FOIA for failure to make records available)

27. Plaintiff repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

28. Defendant’s failure to make available and to release the records requested by Plaintiff violates FOIA, 5 U.S.C. § 552(a)(3)(A).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully prays that this Court:

- a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- b. Declare that Defendant violated FOIA by not releasing records sufficient to reveal the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as “Continued Detention under the AUMF” in the November 2012 GAO report must be disclosed by the defendant in their entirety;
- c. Enjoin Defendant immediately and expeditiously to provide to Plaintiff copies of the records requested in Plaintiff’s December 2012 FOIA;
- d. Award Plaintiff the costs of this proceeding, including reasonable attorneys’ fees and costs; and
- e. Grant such other and further relief as the Court deems just and proper.

Dated: March 15, 2013
Washington, DC

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: /s/ Jay Ward Brown
Jay Ward Brown (Bar ID 437686)
1899 L Street, NW
Suite 200
Washington, DC 20036
t: (202) 508-1136
f: (202) 861-9888

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit A

Presidential Documents

Executive Order 13492 of January 22, 2009

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions. As used in this order:

(a) “Common Article 3” means Article 3 of each of the Geneva Conventions.

(b) “Geneva Conventions” means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) “Individuals currently detained at Guantánamo” and “individuals covered by this order” mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals

have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109–366, as well as of the military commission process more generally.

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) **Review Participants.** The Review shall be conducted with the full cooperation and participation of the following officials:

- (1) the Attorney General, who shall coordinate the Review;
- (2) the Secretary of Defense;
- (3) the Secretary of State;
- (4) the Secretary of Homeland Security;
- (5) the Director of National Intelligence;
- (6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts. The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement. No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

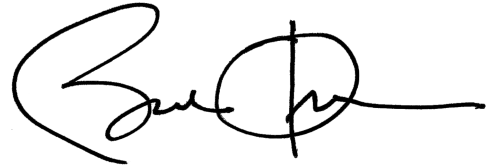
Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. General Provisions.

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish and a horizontal line extending to the right.

THE WHITE HOUSE,
January 22, 2009.

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit B



FINAL REPORT

GUANTANAMO REVIEW TASK FORCE

January 22, 2010

Department of Justice
Department of Defense
Department of State
Department of Homeland Security
**Office of the Director
of National Intelligence**
Joint Chiefs of Staff

EXECUTIVE SUMMARY

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo would further the national security and foreign policy interests of the United States and the interests of justice.

One year after the issuance of the Executive Order, the review ordered by the President is now complete. After evaluating all of the detainees, the review participants have decided on the proper disposition—transfer, prosecution, or continued detention—of all 240 detainees subject to the review.

Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review: the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff.

Review Process

To implement the President's order, the Attorney General, as the coordinator of the review, established the Guantanamo Review Task Force and a senior-level Review Panel. The Task Force was responsible for assembling and examining relevant information on the Guantanamo detainees and making recommendations on their proper dispositions. The Review Panel, consisting of officials with delegated authority from their respective agencies to decide the disposition of each detainee, reviewed the Task Force's recommendations and made disposition decisions on a rolling basis. Where the Review Panel did not reach consensus, or where higher-level review was appropriate, the agency heads ("Principals") named in the Executive Order determined the proper disposition of the detainee.

Key features of the review process included:

- **Comprehensive Interagency Review.** The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the intelligence community.
- **Rigorous Examination of Information.** The Task Force assembled large volumes of information from across the government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.

- **Unanimous Decision-Making by Senior Officials.** Based on the Task Force’s evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

Results of the Review

The decisions reached on the 240 detainees subject to the review are as follows:

- **126 detainees** were approved for transfer. To date, 44 of these detainees have been transferred from Guantanamo to countries outside the United States.
- **44 detainees** over the course of the review were referred for prosecution either in federal court or a military commission, and **36 of these detainees** remain the subject of active cases or investigations. The Attorney General has announced that the government will pursue prosecutions against six of these detainees in federal court and will pursue prosecutions against six others in military commissions.
- **48 detainees** were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government’s authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.
- **30 detainees** from Yemen were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

Looking Ahead

With the completion of the review, an essential component of the effort to close the Guantanamo detention facilities has been accomplished. Beyond the review, additional work remains to be done to implement the review decisions and to resolve other issues relating to detainees. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.

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I. Introduction

An essential component of the President's order calling for the closure of the detention facilities at the Guantanamo Bay Naval Base was the initiation of a new and rigorous interagency review of all individuals detained there. The purpose of the review was to collect and examine information from across the government to determine which detainees the United States should transfer or release from custody, prosecute, or otherwise lawfully detain.

This review is now complete. After carefully considering each case, the agencies responsible for the review—the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff—have unanimously agreed on the proper disposition of all 240 detainees subject to the review. While there remain other steps outside the scope of the review that must be taken before the detention facilities at Guantanamo can be closed, the completion of the review fulfills a central element of the President's order.

This report describes the process by which the review was conducted over the past year, the decisions resulting from the review, and the progress made toward implementing those decisions.

II. Background

Following the terrorist attacks of September 11, 2001, the United States was faced with the question of what to do with individuals captured in connection with military operations in Afghanistan or in other counterterrorism operations overseas. Starting in January 2002, the military began transferring a number of these individuals to the detention facilities at Guantanamo. By the end of 2002, 632 detainees had been brought to Guantanamo. In 2003, 117 additional detainees were brought to the base, with 10 more detainees added in 2004, 14 detainees in 2006, five detainees in 2007, and one detainee in 2008. Since 2002, a total of 779 individuals have been detained at Guantanamo in connection with the war against al-Qaida, the Taliban, and associated forces.

From 2002 through 2008, most of the individuals detained at Guantanamo were transferred or released from U.S. custody, with the vast majority being repatriated to their home countries and others resettled in third countries willing to receive them. Of the 779 individuals detained at Guantanamo, approximately 530—almost 70 percent—were transferred or released from U.S. custody prior to 2009. The countries to which these detainees were transferred include Afghanistan, Albania, Algeria, Australia, Bahrain, Bangladesh, Belgium, Bosnia, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Somalia (Somaliland), Spain, Sudan, Sweden, Tajikistan, Tunisia, Turkey, Uganda, the United Arab Emirates, the United Kingdom, and Yemen.

By January 20, 2009, the population of detainees at Guantanamo had been reduced to 242. Of the 242 remaining detainees, 59 had been approved for transfer by the prior administration and were awaiting implementation of their transfers.

III. The President's Executive Order

On January 22, 2009, the President issued an Executive Order requiring the closure of the detention facilities at Guantanamo within one year. Noting the length of the detentions and the significant concerns they had raised both within the United States and internationally, the President determined that the "prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice."

Accordingly, the President ordered the Executive Branch to conduct a prompt and comprehensive interagency review of the factual and legal bases for the continued detention of all individuals remaining at Guantanamo. The President ordered that the review be coordinated by the Attorney General and conducted with the full cooperation and participation of the Secretary of Defense, Secretary of State, Secretary of Homeland Security, Director of National Intelligence, and Chairman of the Joint Chiefs of Staff.

The first task given to the review participants under the Executive Order was to assemble, to the extent reasonably practicable, all information in the possession of the federal government pertaining to any individual then detained at Guantanamo and relevant to determining his proper disposition.

The Executive Order then set forth the following framework for the review participants to follow in determining the disposition of each detainee:

- First, on a rolling basis and as promptly as possible, determine whether it is possible to transfer or release the detainee consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect the detainee's transfer or release;
- Second, with respect to any detainee not approved for transfer or release, determine whether the federal government should seek to prosecute the detainee for any offenses he may have committed, including whether it is feasible to prosecute such individual in a court established pursuant to Article III of the United States Constitution (*i.e.*, federal court); and
- Third, with respect to any detainee whose disposition is not achieved through transfer, release, or prosecution, select other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee.

The Executive Order further directed that the Secretary of Defense, the Secretary of State, and other review participants work to effect promptly the release or transfer of all individuals for whom release or transfer is possible, and that the Secretary of State expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement the order.

Finally, the Executive Order required that any individuals who remained in detention at Guantanamo at the time of the closure of the detention facilities be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

IV. Implementing the Executive Order: The Guantanamo Review Task Force

A. Establishment of the Task Force

To implement the Executive Order, the Attorney General established the Guantanamo Review Task Force and appointed an Executive Director of the Task Force on February 20, 2009. The Task Force was charged with assembling and reviewing relevant information on the Guantanamo detainees and making recommendations to senior-level officials on the proper disposition of each detainee pursuant to the framework set forth in the Executive Order. To ensure that the expertise and perspectives of each participating agency were brought to bear on the review process, the Task Force was established as an interagency entity. Further, to maximize collaboration and exchange of information among Task Force members, all Task Force staff were located together in a secure facility, on a single floor devoted to Task Force work, and connected electronically through a stand-alone classified network.

B. Task Force Structure

With the assistance of the participating agencies, the Task Force assembled a staff of over 60 career professionals, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Federal Bureau of Investigation, Central Intelligence Agency, and National Counterterrorism Center. Included in this wide range of representatives were senior military officers, federal prosecutors, FBI agents, intelligence analysts and officers, military prosecutors and investigators, national security lawyers, civil litigators, paralegals, and administrative assistants. During their tenure at the Task Force, these staff members worked full-time on the Task Force review.

The Task Force staff was initially organized into two review teams. The transfer team was responsible for evaluating whether detainees could be transferred or released consistent with the national security and foreign policy interests of the United States.¹

¹ The term “release” is used to mean release from confinement without the need for continuing security measures in the receiving country, while the term “transfer” is used to mean release from confinement subject to appropriate security measures.

The team primarily evaluated the degree of threat posed by the detainee to U.S. national security, whether the threat could be mitigated through appropriate security measures, and the potential destination countries where it appeared possible to safely transfer the detainee. The transfer team was composed of representatives from each agency listed in the Executive Order.

The prosecution team was responsible for recommending whether the government should seek to prosecute certain detainees in either federal court or the military commission system. The prosecution team was staffed predominantly by experienced federal prosecutors, investigative agents, and criminal appellate specialists from the Department of Justice,² as well as military commission prosecutors and investigative agents from the Department of Defense.

The work of the transfer and prosecution teams often overlapped, and the two teams worked in close coordination over the course of the review. As described below, after an initial review of all the detainees, the transfer and prosecution teams merged to conduct a further review of detainees whose cases had been deferred during the initial review.

The interagency makeup of the review teams was designed to ensure that all relevant agency viewpoints—including military, intelligence, homeland security, diplomatic, and law enforcement—were considered in the review process. Thus, proposed recommendations for transfer or continued detention were drafted, reviewed, and vigorously discussed in group deliberations by representatives of each of the participating agencies. After these extensive discussions on each detainee, any dissenting views of the agency representatives were noted in the recommendations or otherwise made known to the Review Panel.

C. Guantanamo Review Panel

The Task Force's recommendations, which contained detailed classified assessments of each detainee, were submitted on a rolling basis to the interagency Guantanamo Review Panel. The Review Panel was established in February 2009 along with the Task Force and was composed of senior-level officials from each of the agencies identified in the Executive Order.³ Review Panel members were delegated authority from their respective agency heads ("Principals") to decide the disposition of each detainee. Review Panel members were also responsible for ensuring that their respective agencies made relevant information in their possession available to the Task Force and

² Specifically, federal prosecutors on the Task Force were drawn from United States Attorneys' Offices in the Southern District of New York, Eastern District of New York, Western District of New York, District of Columbia, Eastern District of Virginia, Central District of California, Northern District of California, and District of Maine, and from the Counterterrorism Section of the National Security Division in the Department of Justice.

³ Senior officials from the Central Intelligence Agency and Federal Bureau of Investigation also regularly attended the Review Panel meetings to further inform the decision-making process.

provided the Task Force with personnel and other resources necessary for the Task Force to complete its review within the one-year time frame mandated by the President.

Beginning in March 2009, the Review Panel met on a weekly basis to consider the recommendations of the Task Force. The Review Panel made disposition decisions only by unanimous agreement of the agencies identified in the Executive Order. Thus, each of the participating agencies had an equal voice in disposition decisions, and no decisions were made by the Review Panel over the objection of any agency. In the large majority of cases, the Review Panel was able to achieve consensus and reach decisions regarding the detainees considered. When Review Panel members did not reach consensus, or when higher-level review was appropriate, the cases were referred to the Principals for a decision. All of the cases referred to the Principals also ultimately garnered the unanimous agreement of the participating agencies.

Once a final decision was made regarding the disposition of a particular detainee, the decision was passed to the appropriate agencies for implementation. If a detainee was approved for transfer to a foreign country as a result of the review, the Department of State and Department of Defense worked together to make appropriate arrangements to effect the transfer in a manner consistent with the national security and foreign policy interests of the United States, including U.S. policies concerning humane treatment. If a decision was made by the Review Panel for prosecution, the case was referred to the Department of Justice for further investigation and review under a joint protocol established by the Department of Justice and Department of Defense to determine whether to pursue prosecution of the case in federal court or a military commission. The Review Panel was regularly updated on the implementation of transfer decisions and prosecution referrals, as well as any issues arising out of the implementation of these decisions requiring further interagency consideration.

D. Task Force Information Collection

In accordance with the Executive Order, the Task Force's initial responsibility was to collect all government information, to the extent reasonably practicable, relevant to determining the proper disposition of each detainee. The government did not have a preexisting, consolidated repository of such information. Rather, each federal agency stored information concerning Guantanamo detainees in its own systems, consistent with its particular mission and operating protocols.

Accordingly, soon after it was formed, the Task Force initiated an effort to collect detainee information and make it available for review by Task Force members. As a result of this complex effort, the Task Force consolidated a large volume of information from the Department of Defense, Central Intelligence Agency, Federal Bureau of Investigation, Department of Justice, National Security Agency, National Counterterrorism Center, Department of State, and Department of Homeland Security.

The documents assembled by the Task Force include summaries of biographic and capture information; interrogation reports from custodial interviews of the detainees;

records of Department of Defense administrative proceedings involving the detainees, *i.e.*, Combatant Status Review Tribunals and Administrative Review Board proceedings; the results of name traces run for detainees in certain intelligence databases maintained by the Central Intelligence Agency and National Security Agency; the results of name traces run for detainees in law enforcement databases maintained by the Federal Bureau of Investigation; investigative records maintained by the Office of Military Commissions–Prosecution (“OMC”) and Criminal Investigative Task Force within the Department of Defense; records assembled by the Department of Justice for purposes of defending habeas litigation brought by detainees to challenge their detention; recidivism assessments concerning former detainees; finished intelligence products on the detainee population and on general topics of interest to the Task Force’s work; and information concerning potential destination countries for detainees approved for transfer or release. The Task Force also accepted written submissions made on behalf of individual detainees by their counsel or other representatives.

Additionally, the Task Force had access to a variety of external networks containing additional information on the detainees, including documentary and physical evidence recovered through counterterrorism operations, and records concerning the behavior, disciplinary infractions, and physical and mental health of the detainees during detention. Over the course of the review, the Task Force also received briefings from the intelligence community on a number of topics relevant to the review.

The review of all this information was conducted in a classified environment using secure systems.

E. Review Phases

Following an initial period to stand up the Task Force and collect detainee information, the Task Force began to review detainees on March 5, 2009. The review was conducted in two phases. During the first phase, the Task Force reviewed all 240 detainees subject to the review.⁴ In accordance with the framework set forth in the Executive Order, the purpose of the first phase of the review was to identify those detainees who could be transferred or released consistent with the national security and foreign policy interests of the United States, those detainees as to whom prosecution appeared feasible, and those detainees who required further evaluation before a decision could be made on their appropriate disposition.

The purpose of the second phase of the review was to reevaluate those detainees who had been deferred during the first phase. Each detainee reviewed in the second phase was considered for transfer, prosecution, or—in the event that neither of these dispositions was deemed appropriate—continued detention pursuant to the government’s

⁴ Although there were 242 detainees at Guantanamo when the Executive Order was issued, one detainee had already been convicted and sentenced to life in the military commission system in 2008, and another detainee committed suicide in June 2009. Thus, there were 240 detainees whose dispositions were reviewed under the Executive Order.

authority under the Authorization for Use of Military Force (“AUMF”) passed by Congress in response to the attacks of September 11, 2001.

V. Detainee Review Guidelines

In conducting its reviews, the Task Force followed detainee review guidelines (“Guidelines”) developed specifically for the Executive Order review and approved by the Review Panel. The Guidelines set forth standards to apply in considering detainees for transfer, prosecution, or continued detention pursuant to the government’s authority under the AUMF.

A. Transfer Guidelines

The Guidelines addressed three types of evaluations relevant to determining whether a detainee should be recommended for transfer or release.

The first evaluation required by the Guidelines was a threat evaluation. The Guidelines provided that a detainee should be deemed eligible for transfer if any threat he poses could be sufficiently mitigated through feasible and appropriate security measures.⁵ The Guidelines set forth a non-exclusive list of factors to be considered in evaluating the threat posed by a detainee. In applying those factors, the Task Force was instructed to consider the totality of available information regarding the detainee, and to give careful consideration to the credibility and reliability of the available information.

The second evaluation required by the Guidelines was an evaluation of potential destination (*i.e.*, receiving) countries. The Guidelines left the Task Force with discretion whether to recommend a detainee for transfer only to specified countries or under specified conditions. As with the threat evaluation, the Guidelines provided a non-exclusive set of factors by which to evaluate potential receiving countries.

The third evaluation required by the Guidelines was a legal evaluation to ensure that any detainee falling outside the government’s lawful detention authority under the AUMF was recommended for transfer or release.

B. Prosecution Guidelines

The Guidelines also required cases to be evaluated by Task Force prosecutors to determine whether a federal court or military commission prosecution should be recommended for any offenses the detainees may have committed.

For the evaluation of whether a detainee should be prosecuted in federal court, the Guidelines set forth standards used by federal prosecutors across the country to determine

⁵ The Guidelines further provided that a detainee should be deemed eligible for release if he does not pose an identifiable threat to the national security of the United States. Other than the 17 Chinese Uighur detainees, who were approved for “transfer or release,” no detainees were approved for “release” during the course of the review.

whether to charge a case, as set forth in the *United States Attorneys' Manual*. Consistent with these standards, the Guidelines provided that a case should be recommended for prosecution if the detainee's conduct constitutes a federal offense and the potentially available admissible evidence will probably be sufficient to obtain and sustain a conviction—unless prosecution should be declined because no substantial federal interest would be served by prosecution. Key factors in making this determination include the nature and seriousness of the offense; the detainee's culpability in connection with the offense; the detainee's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the detainee is convicted.

For the evaluation of whether a detainee should be prosecuted in a military commission, Task Force prosecutors examined the potentially available admissible evidence and consulted closely with OMC to determine the feasibility of prosecution.

Recognizing the unique nature of these cases, the Guidelines provided that other factors were also significant in determining whether to recommend prosecution, including the need to protect classified information, such as intelligence sources and methods.

C. Detention Guidelines

In accordance with the Executive Order, the Guidelines provided that every effort should be made to ensure that all detainees who could be recommended for transfer, release, or prosecution consistent with national security and foreign policy interests and the interests of justice were recommended for such dispositions. Thus, the Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.

The Guidelines required the Task Force to consult with the Department of Justice in conducting a legal evaluation for each detainee considered for continued detention. This legal evaluation addressed both the legal basis for holding the detainee under the AUMF and the government's case for defending the detention in any habeas litigation.⁶

As the Supreme Court has held, inherent within the authorization of the AUMF to "use all necessary and appropriate force" is the power to detain any individuals who fall within the scope of the statute.⁷ As the Court observed, "by universal agreement and

⁶ The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons." AUMF § 2(a).

⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J.) (dissenting).

practice,” the power to wage war necessarily includes the authority to capture and detain combatants in order to prevent them from “returning to the field of battle and taking up arms once again.”⁸ The scope of the AUMF’s detention authority extends to those persons who “planned, authorized or committed or aided” the September 11 attacks, “harbored those responsible for those attacks,” or “were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”⁹ Accordingly, only detainees who satisfied this standard could be designated for continued detention.

D. Review of Information

Consistent with the Guidelines’ requirement that the Task Force undertake a fresh and comprehensive evaluation of detainee information, the Task Force sought to make independent evaluations of the facts. In many instances, the Task Force largely agreed with prior threat assessments of the detainees and sometimes found additional information that further substantiated such assessments. In other instances, the Task Force found prior assessments to be overstated. Some assessments, for example, contained allegations that were not supported by the underlying source document upon which they relied. Other assessments contained conclusions that were stated categorically even though derived from uncorroborated statements or raw intelligence reporting of undetermined or questionable reliability. Conversely, in a few cases, the Task Force discovered reliable information indicating that a detainee posed a greater threat in some respects than prior assessments suggested.

Even after careful examination of the intelligence, however, it was not always possible to draw definitive conclusions regarding a detainee’s past conduct. Many of the detainees were captured in active zones of combat and were not previously the targets of investigation by U.S. law enforcement authorities or the intelligence community. Much of what is known about such detainees comes from their own statements or statements made by other detainees during custodial debriefings. The Task Force sought to ensure that the Review Panel and Principals were apprised in their decision-making of any limitations of the available information.

VI. Results of the Review

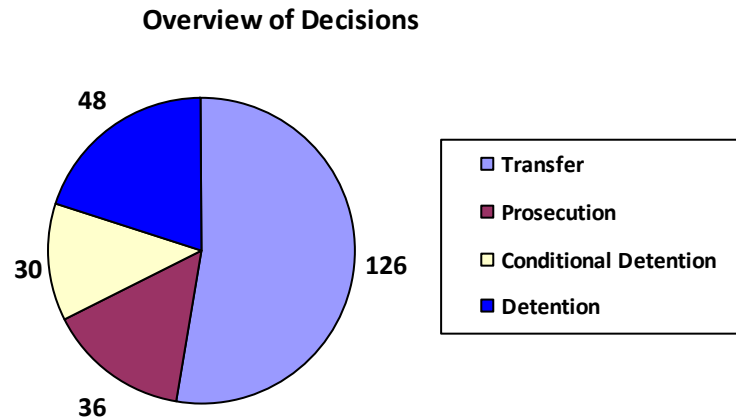
A. Overview of Decisions

By the one-year mark of January 22, 2010, the review participants reached decisions on the appropriate disposition of all 240 detainees subject to the Executive Order. In sum, 126 detainees were approved for transfer; 36 detainees were referred for

⁸ *Id.* at 518; *see also id.* at 587 (Thomas, J.) (dissenting) (same).

⁹ *See* Gov’t Filing, *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. March 13, 2009). The United States Court of Appeals for the District of Columbia recently affirmed that Guantanamo detainees who meet this standard are detainable. *See also Al-Bihani v. Obama*, --- F.3d ---, 2010 WL 10411 at *3 (D.C. Cir. Jan. 5, 2010).

prosecution;¹⁰ 48 detainees were approved for continued detention under the AUMF; and 30 detainees from Yemen were approved for “conditional” detention based on present security conditions in Yemen.



After careful deliberation, all of these decisions were reached by unanimous agreement of senior officials from each agency responsible for the review. Thus, each decision carries the approval of the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. A more detailed breakdown of the decisions follows.

Detainees Approved for Transfer

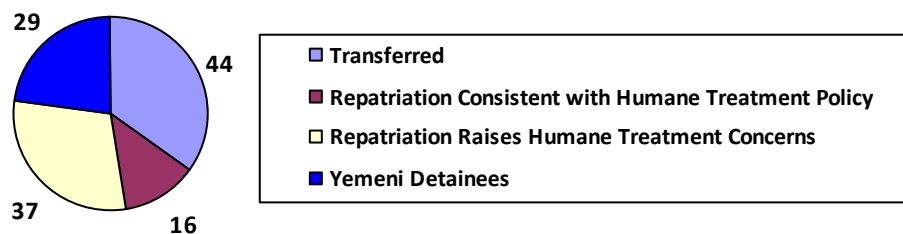
- 126 detainees were unanimously approved for transfer subject to appropriate security measures.
 - 63 of the 126 detainees either had been cleared for transfer by the prior administration, ordered released by a federal district court, or both.
 - 44 of the 126 detainees have been transferred to date—24 to their home countries, 18 to third countries for resettlement, and two to Italy for prosecution.
 - 82 of the 126 detainees remain at Guantanamo. Of these detainees:
 - 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies on humane treatment. The State Department and Department of Defense are working with these countries concerning the security conditions and timing of the

¹⁰ As explained below, 44 cases were initially referred for prosecution; 36 of those cases remain the subject of active referrals.

transfers. Some of these detainees have obtained injunctions that presently bar their repatriation and cannot be repatriated until these injunctions are lifted; litigation over the injunctions is ongoing.

- 37 cannot be repatriated at this time due to humane treatment or related concerns associated with their home countries (other than Yemen). The State Department is seeking to resettle these detainees in third countries. (A small number of these detainees may be transferred to third countries for prosecution rather than resettlement.)
- 29 are from Yemen. In light of the moratorium on transfers of Guantanamo detainees to Yemen announced by the President on January 5, 2010, these detainees cannot be transferred to Yemen at this time. In the meantime, these detainees are eligible to be transferred to third countries capable of imposing appropriate security measures.

Detainees Approved for Transfer

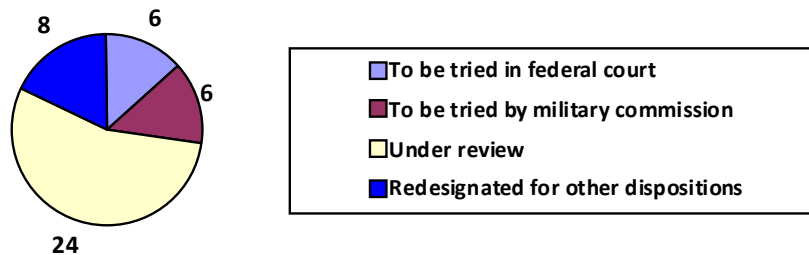


Detainees Referred for Prosecution

- Initially, 44 detainees were referred for prosecution. As a result of further evaluation of these cases (detailed below), there are now 36 detainees who remain the subject of active cases or investigations.
 - 1 detainee (Ahmed Ghailani) has been transferred to the Southern District of New York and will be tried for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania.
 - 5 detainees will be tried in the Southern District of New York, for their alleged roles in the September 11 attacks, as announced by the Attorney General.
 - 6 detainees will be tried for offenses under the laws of war in a reformed military commission system, as announced by the Attorney General.
 - 24 detainees remain under review pursuant to the joint Department of Justice-Department of Defense protocol. No final determination has yet been made as to whether or in what forum these 24 detainees will be charged.

- 8 other detainees were initially referred for prosecution but subsequently designated for other dispositions.
 - 1 detainee was transferred pursuant to a court order in his habeas case.
 - 7 detainees were referred back to the review participants after prosecution was deemed not feasible upon further evaluation (6 were subsequently approved for continued detention under the AUMF, and 1 was approved for transfer).

Detainees Referred for Prosecution



Detainees Approved for Detention

- 48 detainees were unanimously approved for continued detention under the AUMF based on a finding that they pose a national security threat that could not be mitigated sufficiently at this time if they were to be transferred from U.S. custody.
 - The Task Force concluded as to all of these detainees that prosecution is not feasible at this time in either federal court or the military commission system.
 - At the same time, the Task Force concluded that there is a lawful basis for continuing to detain these detainees under the AUMF.

Detainees Approved for Conditional Detention

- 30 detainees from Yemen were unanimously approved for “conditional” detention based on current security conditions in Yemen.
 - After carefully considering the intelligence concerning the security situation in Yemen, and reviewing each detainee on a case-by-case basis, the review participants selected a group of 30 Yemeni detainees who pose a lower threat than the 48 detainees designated for continued detention under the AUMF, but who should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.
 - These 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the

security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.

B. Overview of the Guantanamo Detainee Population

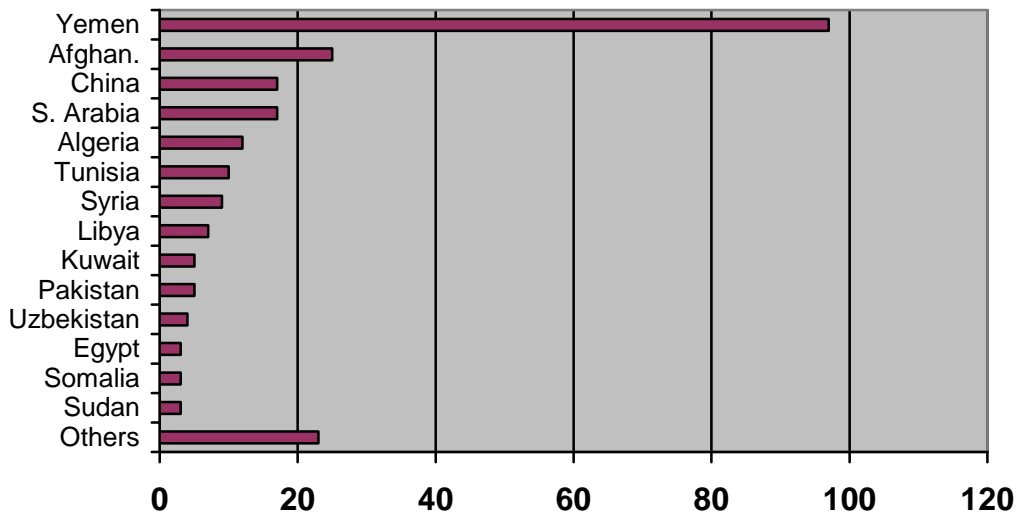
The following section provides an overview of the 240 Guantanamo detainees reviewed under the Executive Order, including their threat characteristics and more general background information, including country of origin, point of capture, and date of arrival at Guantanamo.

Threat Characteristics. As reflected in the decisions made in the review, there is a substantial degree of variation among the Guantanamo detainees from a security perspective. Although not all detainees can be neatly characterized, the following groupings provide a rough overview of the recurring threat profiles seen in the population.

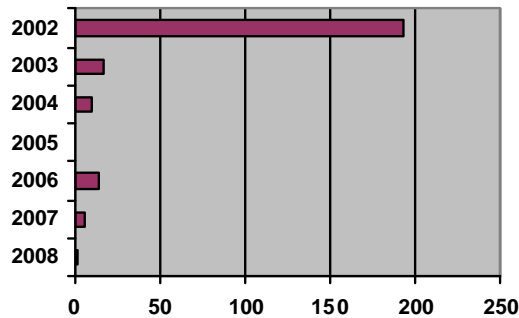
- *Leaders, operatives, and facilitators involved in terrorist plots against U.S. targets.* At the high end of the threat spectrum are leaders, planners, operatives, and facilitators within al-Qaida or associated groups who are directly implicated in terrorist plots against U.S. interests. Among the most notorious examples in this group are Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks; Ramzi bin al-Shibh, the alleged principal coordinator of the September 11 attacks; Abd al-Rahim al-Nashiri, the alleged mastermind of the attack on the U.S.S. *Cole*; Abu Faraj al-Libi, who allegedly succeeded Khalid Sheikh Mohammed as al-Qaida's chief planner of terrorist operations; Hambali, the alleged leader of an al-Qaida affiliate in Indonesia who directed numerous attacks against Western targets in Southeast Asia; and Ahmed Ghailani, an alleged key participant in the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Roughly 10 percent of the detainees subject to the review appear to have played a direct role in plotting, executing, or facilitating such attacks.
- *Others with significant organizational roles within al-Qaida or associated terrorist organizations.* Other detainees played significant organizational roles within al-Qaida or associated terrorist organizations, even if they may not have been directly involved in terrorist plots against U.S. targets. This group includes, for example, individuals responsible for overseeing or providing logistical support to al-Qaida's training operations in Afghanistan; facilitators who helped move money and personnel for al-Qaida; a cadre of Usama bin Laden's bodyguards, who held a unique position of trust within al-Qaida; and well-trained operatives who were being groomed by al-Qaida leaders for future terrorist operations. Roughly 20 percent of the detainees subject to the review fall within this category.

- *Taliban leaders and members of anti-Coalition militia groups.* The detainee population also includes a small number of Afghan detainees who occupied significant positions within the Taliban regime, and a small number of other Afghan detainees who were involved in local insurgent networks in Afghanistan implicated in attacks on Coalition forces. Less than 10 percent of the detainees subject to the review fall within this category.
- *Low-level foreign fighters.* A majority of the detainees reviewed appear to have been foreign fighters with varying degrees of connection to al-Qaida, the Taliban, or associated groups, but who lacked a significant leadership or other specialized role. These detainees were typically captured in combat zones during the early stages of U.S. military operations in Afghanistan, often by Northern Alliance troops or other allied forces, without being specifically targeted for capture by (or even known to) the U.S. military in advance. Many were relatively recent recruits to training camps in Afghanistan run by al-Qaida or other groups, where they received limited weapons training, but do not appear to have been among those selected for more advanced training geared toward terrorist operations abroad.
- *Miscellaneous others.* The remaining detainees—roughly 5 percent—do not fit into any of the above categories.

Country of Origin. The Guantanamo detainees reviewed included individuals from a number of different countries, including Yemen, Afghanistan, China, Saudi Arabia, Algeria, Tunisia, Syria, Libya, Kuwait, and Pakistan. Approximately 40 percent—97 detainees—were Yemeni, while over 10 percent were Afghan.



Point of Capture. The large majority of the detainees in the population reviewed—approximately 60 percent—were captured inside Afghanistan or in the Afghanistan-Pakistan border area. Approximately 30 percent of the detainees were captured inside Pakistan. The remaining 10 percent were captured in countries other than Afghanistan or Pakistan.



Arrival at Guantanamo. Most of the detainees reviewed—approximately 80 percent—arrived at Guantanamo in 2002, having been captured during the early months of operations in Afghanistan. The remaining detainees arrived in small numbers over succeeding years.

VII. Transfer Decisions

A. Background

As the first step in the review process, the Executive Order required the review participants to determine which Guantanamo detainees could be transferred or released consistent with the national security and foreign policy interests of the United States. The Executive Order further required the Secretary of Defense, the Secretary of State, and other review participants as appropriate, to “work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.”

Prior to the initiation of the review, 59 of the 240 detainees subject to review were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued. One reason for their continued detention was that more than half of the 59 detainees could not be returned to their home countries consistent with U.S. policy due to post-transfer treatment concerns.¹¹ Thus, many of the 59 detainees required resettlement in a third country, a process that takes time and requires extensive diplomatic efforts.

In addition, 29 of the detainees subject to review were ordered released by a federal district court as the result of habeas litigation. Of these 29 detainees, 18 were

¹¹ It is the longstanding policy of the United States not to transfer a person to a country if the United States determines that the person is more likely than not to be tortured upon return or, in appropriate cases, that the person has a well-founded fear of persecution and is entitled to persecution protection. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Protocol Relating to the Status of Refugees. Accordingly, prior to any transfer, the Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in the given country and the adequacy and credibility of assurances obtained from the foreign government.

ordered released after the government conceded the case.¹² The remaining 11 detainees were ordered released after a court reached the merits of the case and ruled, based on a preponderance of the evidence, that the detainee was not lawfully held because he was not part of, or did not substantially support, al-Qaida, the Taliban, or associated forces.¹³ Of the 29 detainees ordered released, 18 were among the 59 who had been approved by the prior administration for transfer or release. Thus, a total of 70 detainees subject to the review were either approved for transfer during the prior administration or ordered released by a federal court.

B. Decisions

Based on interagency reviews and case-by-case threat evaluations, 126 of the 240 detainees were approved for transfer by agreement of senior officials from the agencies named in the Executive Order.

The 126 detainees unanimously approved for transfer include 44 who have been transferred to date—24 to their home countries,¹⁴ 18 to third countries for resettlement,¹⁵ and two to Italy for prosecution. Of the 82 detainees who remain at Guantanamo and who have been approved for transfer, 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies concerning humane treatment, 38 cannot be repatriated due to humane treatment or related concerns in their home countries (other than Yemen) and thus need to be resettled in a third country, and 29 are from Yemen. Half of all detainees approved for transfer—63 of the 126—also had been approved for transfer during the prior administration, ordered released by a federal court, or both.¹⁶

There were considerable variations among the detainees approved for transfer. For a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan. However, for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan. Thousands of such individuals are believed to have passed

¹² Of the 18 cases conceded by the government, 17 were brought by the Uighur detainees and were conceded by the prior administration. Eleven of the 18 detainees have been transferred to date.

¹³ A total of 14 detainees have won their habeas cases on the merits in district court. The government transferred three of these detainees in December 2008; thus, they were not subject to the review. Of the 11 remaining detainees who were reviewed under the Executive Order, seven have been transferred to date. Of the four who have not been transferred, the United States is appealing the district court's ruling in two of the cases, and is still within the time period to appeal the remaining two cases.

¹⁴ The 24 detainees transferred to their home countries were repatriated to Afghanistan (5), Algeria (2), Chad (1), Iraq (1), Kuwait (2), Saudi Arabia (3), Somalia (Somaliland) (2), the United Kingdom (1), and Yemen (7).

¹⁵ The 18 detainees transferred to third countries for resettlement were transferred to Belgium (1), Bermuda (4), France (2), Hungary (1), Ireland (2), Portugal (2), and Palau (6).

¹⁶ The review participants reviewed the detainees who had been approved for transfer by the prior Administration and designated seven such detainees (all of whom were from Yemen) for conditional detention instead of transfer.

through Afghanistan from the mid-1990s through 2001, recruited through networks in various countries in the Middle East, North Africa, and Europe. These individuals varied in their motivations, but they typically sought to obtain military training at one of the many camps operating in Afghanistan; many subsequently headed to the front lines to assist the Taliban in their fight against the Northern Alliance. For the most part, these individuals were uneducated and unskilled. At the camps, they typically received limited weapons training. While al-Qaida used its camps to vet individuals for more advanced training geared toward terrorist operations against civilian targets, only a small percentage of camp attendees were deemed suitable for such operations. The low-level fighters approved for transfer were typically assessed by the review participants not to have been selected for such training. Many were relatively recent recruits to the camps, arriving in Afghanistan in the summer of 2001. After the camps closed in anticipation of the arrival of U.S. forces in October 2001, some of these individuals were transported by camp personnel or otherwise made their way to the Tora Bora mountain range, where they joined fighting units, but subsequently dispersed in the face of U.S. air attacks.

It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented. Some detainees were approved for transfer only to specific countries or under specific conditions, and a few were approved for transfer only to countries with pending prosecutions against the detainee (or an interest in pursuing a future prosecution). Each decision was made on a case-by-case basis, taking into account all of the information about the detainee and the receiving country's ability to mitigate any threat posed by the detainee. For certain detainees, the review participants considered the availability of rehabilitation programs and mental health treatment in the receiving country. The review participants also were kept informed of intelligence assessments concerning recidivism trends among former detainees.

It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee. To be sure, in some cases the review participants had concerns about the strength of the evidence against a detainee and the government's ability to defend his detention in court, and considered those factors, among others, in deciding whether to approve the detainee for transfer. For many of the detainees approved for transfer, however, the review participants found there to be reliable evidence that the detainee had engaged in conduct providing a lawful basis for his detention. The review participants nonetheless considered these detainees appropriate candidates for transfer from a threat perspective, in light of their limited skills, minor organizational roles, or other factors.

C. Yemeni Detainees

From the outset of the review, it was clear that the Yemeni detainees posed a unique challenge: there were 97 Yemenis subject to the review, by far the largest group in the Guantanamo population, and the security situation in Yemen had deteriorated. Al-Qaida was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions. Potential options for rehabilitation programs and other security measures were carefully considered throughout the course of the review, but conditions in Yemen remained a primary concern.

Taking into account the current intelligence regarding conditions in Yemen, and the individual backgrounds of each detainee, the review participants unanimously approved 36 of the 97 Yemeni detainees for transfer subject to appropriate security measures. The decision to approve these detainees for transfer, however, did not require immediate implementation. Rather, by making each transfer decision contingent on the implementation of appropriate security measures, the review participants allowed for necessary flexibility in the timing of these transfers. Under these transfer decisions, detainees would be returned to Yemen only at a time, and only under conditions, deemed appropriate from a security perspective.

To date, only seven of the 36 Yemeni detainees approved for transfer have been transferred to Yemen.¹⁷ One was transferred in September 2009 pursuant to a court order, and six were transferred in December 2009. The six who were repatriated in December 2009 were selected by the unanimous agreement of high-level officials in the agencies named in the Executive Order, after further individualized reviews of the detainees, including consideration of threat-related information, the evidence against the detainees, and the government's ability to successfully defend the lawfulness of their detentions in court. This decision involved high-level coordination within the government and reflected a determination that these six specific detainees should be returned to Yemen at that time.

There are 29 Yemenis approved for transfer who remain at Guantanamo. The involvement of Al-Qaida in the Arabian Peninsula—the branch of al-Qaida based in Yemen—in the recent attempted bombing of an airplane headed to Detroit underscored the continued need for a deliberate approach toward any further effort to repatriate Yemeni detainees. In the wake of the attempted plot, the President publicly announced a moratorium on the transfer of detainees to Yemen. Accordingly, none of the 29 Yemeni detainees remaining at Guantanamo who are approved for transfer will be repatriated to Yemen until the moratorium is lifted. These detainees may be considered for resettlement in third countries subject to appropriate security measures, if such options become available.

¹⁷ During the last administration, 14 detainees were returned to Yemen, and an additional 15 Yemeni detainees were among the 59 approved for (but still awaiting) transfer as of January 20, 2009.

VIII. Prosecution Decisions

A. Background

The Executive Order provides that “[i]n accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution [*i.e.*, federal court].” In a speech at the National Archives on May 21, 2009, the President reiterated that “when feasible, we will try those who have violated American criminal laws in federal courts.” As the President noted in his speech, federal prosecutors have a long history of successfully prosecuting all manner of terrorism offenses in the federal courts:

Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear. Ramzi Yousef tried to blow up the World Trade Center—he was convicted in our courts, and is serving a life sentence in U.S. prison. Zacarias Moussaoui has been identified as the 20th 9/11 hijacker—he was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

The President also stressed that military commissions “have a history in the United States dating back to George Washington and the Revolutionary War” and remained “an appropriate venue for trying detainees for violations of the laws of war.” Accordingly, the administration proposed, and Congress has since enacted, reforms to the military commissions system to ensure that the commissions are fair, legitimate, and effective.

In accordance with the President’s guidance, the Task Force evaluated detainees for possible prosecution wherever there was any basis to conclude that prosecution in either federal court or a military commission was appropriate and potentially feasible. The Task Force prosecutors focused their review at first on the 23 detainees who, as of the issuance of the Executive Order, were facing charges in the military commissions, as well as several other uncharged detainees whose cases were related to those of charged detainees.¹⁸ The Task Force then evaluated for possible prosecution the approximately 40 additional detainees whom OMC had designated for potential prosecution. Finally, the Task Force reviewed every detainee for prosecution who was deemed ineligible for transfer.

¹⁸ As of January 22, 2009, there were 12 detainees whose cases had been referred to a military commission, including the defendants in the September 11 prosecution. In compliance with the Executive Order, their cases were halted.

In conducting its reviews, the Task Force worked closely with OMC. Task Force members had access to OMC files, and OMC prosecutors briefed the Task Force on their cases. Upon request, Department of Defense investigators and FBI agents who had worked on investigations met with Task Force members to answer their questions. The Task Force also reviewed original source information pertaining to the detainees and was able to identify previously unexploited sources of evidence.

As the Task Force completed its prosecution reviews, it identified those cases that appeared feasible for prosecution in federal court, or at least potentially feasible, if certain investigative steps were pursued with success. In this regard, the Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution. Given the limited resources of the Task Force to pursue this additional work, the Review Panel referred cases that appeared potentially feasible for federal prosecution to the Department of Justice for further investigation and prosecutorial review.

The Department of Justice and Department of Defense agreed upon a joint protocol to establish a process for determining whether prosecution of a referred case should be pursued in a federal court or before a military commission. Under the protocol—titled *Determination of Guantanamo Cases Referred for Prosecution*—there is a presumption that prosecution will be pursued in a federal court wherever feasible, unless other compelling factors make it more appropriate to pursue prosecution before a military commission. The evaluations called for under the protocol are conducted by teams of both federal and military prosecutors. Among the criteria they apply are: the nature of the offenses to be charged; the identity of the victims; the location of the crime; the context in which the defendant was apprehended; and the manner in which the case was investigated and by which investigative agency. The Attorney General, in consultation with the Secretary of Defense, makes the ultimate decision as to where a prosecution will be pursued.

B. Decisions

As a result of the Task Force's review, the Review Panel referred 44 cases to the Department of Justice for potential prosecution and a decision regarding the forum for any prosecution.¹⁹ Decisions to seek prosecution have been announced in 12 of these cases; 24 remain pending under the protocol; and eight of the detainees initially referred were subsequently designated for other dispositions.

¹⁹ The review participants did not determine that any additional detainees were potentially feasible for prosecution solely before a military commission at this time.

On May 21, 2009, the Department of Justice announced that Ahmed Ghailani, who had previously been indicted in the United States District Court for the Southern District of New York for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, would be prosecuted in federal court.²⁰ On June 9, 2009, Ghailani was transferred from Guantanamo to the Southern District of New York, where his case is pending.

On November 13, 2009, the Attorney General announced that the government would pursue prosecution in federal court in the Southern District of New York against the five detainees who had previously been charged before a military commission for their roles in the September 11 attacks. They are:

- Khalid Sheikh Mohammed, the alleged mastermind of the September 11 plot;
- Ramzi bin al-Shibh, the alleged coordinator of the September 11 plot who acted as intermediary between Khalid Sheikh Mohammed and the hijackers in the United States;
- Walid Muhammed Salih Mubarak Bin Attash (a.k.a. Khallad Bin Attash), an alleged early member of the September 11 plot who tested airline security on United Airlines flights between Bangkok and Hong Kong;
- Mustafa Ahmed al-Hawsawi, an alleged facilitator of hijackers and money to the United States from his base in Dubai; and
- Ali Abdul Aziz Ali (a.k.a. Ammar Baluchi), a second alleged facilitator of hijackers and money to the United States from his base in Dubai.

On the same day, the Attorney General also announced that the prosecution against Abd al-Rahim al-Nashiri, the alleged mastermind of the bombing of the U.S.S. *Cole*, would be pursued before a military commission. The Attorney General further decided that four other detainees whose cases were pending before military commissions when the Executive Order was issued would remain before the commissions: Ahmed al-Darbi, Noor Uthman, Omar Khadr, and Ibrahim al-Qosi. In January 2010, the Department of Justice announced that Obaidullah, whom OMC had charged but whose case had not yet been referred to a military commission, will remain in the military commission system.

Twenty-four of the referred cases remain pending with the Department of Justice under the protocol. No final decision has been made regarding whether or in what forum these detainees will be prosecuted.

²⁰ The decision to pursue prosecution against Ghailani in federal court was made before the joint prosecution protocol was in effect.

Eight of the referred detainees are no longer under active consideration for prosecution. One detainee who had been referred for prosecution was transferred pursuant to a court order in his habeas case. Seven additional detainees who had been referred for prosecution were ultimately referred back to the Task Force, based on a determination that the cases were not feasible for prosecution in either federal court or the military commission system at this time. Six of these detainees were subsequently approved for continued detention under the AUMF without criminal charges, and one was approved for transfer. As a result of these subsequent decisions, there are currently 36 cases with active prosecution referrals.

C. Detainees Who Cannot Be Prosecuted

The Task Force concluded that for many detainees at Guantanamo, prosecution is not feasible in either federal court or a military commission. There are several reasons for these conclusions.

First, the vast majority of the detainees were captured in active zones of combat in Afghanistan or the Pakistani border regions. The focus at the time of their capture was the gathering of intelligence and their removal from the fight. They were not the subjects of formal criminal investigations, and evidence was neither gathered nor preserved with an eye toward prosecuting them. While the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court. One common problem is that, for many of the detainees, there are no witnesses who are available to testify in any proceeding against them.

Second, many of the detainees cannot be prosecuted because of jurisdictional limitations. In many cases, even though the Task Force found evidence that a detainee was lawfully detainable as part of al-Qaida—*e.g.*, based on information that he attended a training camp, or played some role in the hierarchy of the organization—the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission. While the federal material support statutes have been used to convict persons who have merely provided services to a terrorist organization, *e.g.*, by attending a terrorist training camp, there are potential limitations to pursuing such a charge against the detainees.²¹

²¹ Among these limitations: First, the two relevant statutes—18 U.S.C. §§ 2339A and 2339B—were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively. Thus, material support may not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest. Second, the statute of limitations for these offenses is typically eight years (*see* 18 U.S.C. § 3286), which may bar prosecution for offenses that occurred well before the detainee's capture. Third, because the statutory maximum sentence for material support is 15 years (where death does not result from the offense), sentencing considerations may weigh against pursuing prosecution in certain cases. Some of these considerations would not apply to material support charges brought in the military commissions; however, the legal viability of material support as a charge in the military commission system has been challenged on appeal in commission proceedings.

Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum, as described above.

Significantly, the Executive Order does not preclude the government from prosecuting at a later date someone who is presently designated for continued detention. Work on these cases continues. Further exploitation of the forensic evidence could strengthen the prosecution against some detainees. Other detainees may cooperate with prosecutors. If either the Department of Justice or the Department of Defense concludes in the future that prosecution of a detainee held without charges has become feasible in federal court or in a military commission, the detention decisions made in the course of this review would permit the prosecution to go forward.

IX. Detention Decisions

A. Background

Under the Executive Order, the review participants were required first to consider whether it was possible to transfer, release, or prosecute each detainee. With respect to any detainees who were not deemed appropriate for transfer, release, or prosecution, the review participants were required to “select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.”

In accordance with this framework, detainees were first reviewed to determine whether transfer or release was consistent with the national security and foreign policy interests of the United States and whether they could be prosecuted. If those options did not appear feasible, the review participants then considered whether the detainee’s national security threat justified continued detention under the AUMF without criminal charges, and, if so, whether the detainee met the legal requirements for detention.

B. Decisions

As the result of this review, 48 detainees were unanimously approved for continued detention under the AUMF.

Although each detainee presented unique issues, all of the detainees ultimately designated for continued detention satisfied three core criteria: First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee’s detention under the AUMF.

Broadly speaking, the detainees designated for continued detention were characterized by one or more of the following factors:

- **Significant organizational role within al-Qaida, the Taliban, or associated forces.** In contrast to the majority of detainees held at Guantanamo, many of the detainees approved for detention held a leadership or other specialized role within al-Qaida, the Taliban, or associated forces. Some provided operational, logistical, financial, or fundraising support for al-Qaida. Others were al-Qaida members who were selected to serve as bodyguards for Usama bin Laden based on their loyalty to the organization. Others were Taliban military commanders or senior officials, or played significant roles in insurgent groups in Afghanistan allied with the Taliban, such as Hezb-e-Islami Gulbuddin.
- **Advanced training or experience.** The detainees approved for detention tended to have more extensive training or combat experience than those approved for transfer. Some of these detainees were veteran *jihadists* with lengthy involvement in the training camps in Afghanistan. Several had expertise in explosives or other tactics geared toward terrorist operations.
- **Expressed recidivist intent.** Some detainees designated for detention have, while at Guantanamo, expressly stated or otherwise exhibited an intent to reengage in extremist activity upon release.
- **History of associations with extremist activity.** Some of the detainees approved for detention have a history of engaging in extremist activities or particularly strong ties (either directly or through family members) to extremist organizations.

Lawful basis for detention. Under the Executive Order, every detainee's disposition must be lawful. Accordingly, the Task Force consulted closely with the Department of Justice regarding every detainee approved for continued detention to ensure that the detainee fell within the bounds of the Government's detention authority under the AUMF, as described above.

Prosecution not currently feasible. Although dangerous and lawfully held, the detainees designated for detention currently cannot be prosecuted in either a federal court or a military commission. While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal court or military commission. Though prosecution currently is not feasible for these detainees, designating a detainee for detention does not preclude future prosecution in either a federal court or a military commission should new evidence or other developments make a prosecution viable.

Transfer or release not currently feasible. Finally, none of the detainees approved for detention can be safely transferred to a third country at this time. This does

not mean that the detainee could never be safely transferred to a third country. Rather, designating the detainee for continued detention at this time indicates only that given the detainee's current threat and the current willingness or ability of potential destination countries to mitigate the threat, the detainee is not currently eligible for transfer or release. Should circumstances change (*e.g.*, should potential receiving countries implement appropriate security measures), transfer might be appropriate in the future.

C. Continued Reviews

Detainees approved for continued detention under the AUMF will be subject to further reviews. First, in accordance with the Supreme Court's decision in *Boumediene v. Bush*,²² each detainee has the opportunity to seek judicial review of their detention by filing a petition for a writ of habeas corpus in federal court. In such cases, the court reviews whether the detainee falls within the government's lawful detention authority. In cases where courts have concluded that the detainee is not lawfully held, the courts have issued orders requiring the government to take diplomatic steps to achieve the detainee's release. Thus far, federal district courts have ruled on cases brought by four of the 48 detainees approved for continued detention. In each of the four cases, the district court denied the habeas petition and upheld the lawfulness of the detention. Many other cases are pending in district court, and some are pending on appeal.

Second, as the President stated in his speech at the National Archives, "a thorough process of periodic review" is needed to ensure that "any prolonged detention is carefully evaluated and justified." Thus, in addition to the judicial review afforded through habeas litigation, each detainee approved for continued detention will be subject to periodic Executive Branch review.

X. Conditional Detention Decisions: Yemeni Detainees

As discussed above, the review of the 97 Yemeni detainees posed particular challenges from the outset given the security situation in Yemen. After conducting a case-by-case review of the Yemeni detainees, the review participants unanimously agreed that 36 Yemenis (29 of whom remain at Guantanamo) are appropriate for transfer, subject to security measures, and that 26 Yemenis should continue to be detained under the AUMF in light of their individual threat. In addition, there are currently five Yemenis with active prosecution referrals, two of whom the Attorney General announced will be prosecuted in federal court for their roles in the September 11 attacks (Ramzi bin al-Shibh and Walid Muhammed Salih Mubarak Bin Attash).

The remaining 30 Yemeni detainees were determined to pose a lower threat than the group of detainees designated for continued detention under the AUMF. Nonetheless, the review participants determined, based on a number of factors, that these 30 detainees should not be transferred to Yemen in the near future and should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.

²² 122 S. Ct. 2229 (2008).

Thus, these 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the remaining 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.²³

At the time of the closure of the detention facilities at Guantanamo, the status of detainees approved for conditional detention will be reconsidered for possible transfer to Yemen, a third country, or a detention facility in the United States.

XI. Diplomatic Efforts

The President’s Executive Order recognized that diplomatic efforts would be essential to the review and appropriate disposition of individuals detained at Guantanamo. To implement the review decisions approving the transfer of detainees, the order provides that the “Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.” The President emphasized this point during his speech at the National Archives, stating that for cases involving “detainees who we have determined can be transferred safely to another country . . . my Administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil.”

To fulfill this mission, the Secretary of State created an office to lead the diplomatic efforts to transfer detainees and appointed an experienced career diplomat to serve as the Special Envoy for the Closure of the Guantanamo Bay Detention Facilities. The highest levels in the administration supported these efforts. The President, Vice President, and Cabinet members—including the Secretary of State, Attorney General, and Secretary for Homeland Security—have discussed the closure of the Guantanamo detention facilities and the transfer of detainees outside the United States with their foreign government counterparts. To assist these diplomatic efforts, the National Counterterrorism Center facilitated the sharing of information about the detainees with foreign governments considering whether to accept them. In addition, the government arranged meetings between officials from interested countries and detainees at Guantanamo to facilitate resettlement and repatriation discussions.

From the outset of the review, the State Department developed a diplomatic strategy for Guantanamo, focusing on efforts to resettle detainees who could not be sent to their home countries because of post-transfer treatment concerns. In June 2009, the United States and European Union concluded a joint statement in support of the

²³ Ten of the detainees approved for conditional detention had initially been approved for transfer by the review participants. Because the specific conditions placed on the transfer approvals of these 10 detainees were the equivalent of those used for the conditional detention category, the 10 detainees were later redesignated for conditional detention.

resettlement of a number of detainees in Europe, expressing the readiness of certain member states to resettle former Guantanamo detainees on a case-by-case basis. Following this joint statement, a number of European governments—such as Spain, Italy, Portugal, and Ireland—announced that they were prepared to work out arrangements to accept some detainees. In addition, the Government of Palau also announced its readiness to accept a number of Uighur detainees. Following these initial successes, the State Department intensified efforts to implement resettlements. The public offers by some European governments to resettle detainees encouraged other governments to make similar offers.

To date, the diplomatic efforts taken under the Executive Order have led to the resettlement of 18 detainees in the following seven locations: Belgium, Bermuda, France, Hungary, Ireland, Palau, and Portugal.²⁴ Resettlement negotiations are ongoing with a number of countries, *e.g.*, Spain, Switzerland, and Slovakia. In addition, Italy accepted two detainees for criminal prosecution on charges stemming from pre-9/11 activities. All efforts to resettle detainees include discussions with receiving governments about post-transfer security measures, as well as other issues such as the integration and humane treatment of resettled detainees.

The process for engaging a country on resettlement issues can be lengthy and complicated. The State Department has engaged in discussions with dozens of countries across the globe to initiate or further resettlement negotiations once it has been determined that a government is open to discussions. When this process is successful, initial receptiveness leads to discussions regarding individual detainees, foreign government interagency review, foreign government interviews of prospective resettlement candidates, the foreign government's formal decision-making process, integration plans, and, ultimately, resettlement. The length of the effort often has been influenced by political and other issues in potential resettlement countries (*e.g.*, public perceptions of current and past U.S. detention policies), third-country views (and sometimes pressure) with respect to detainee resettlement, and public views of the Guantanamo detention facility generally. Depending on how these factors affect individual cases, the process can be very lengthy.

Once a resettlement has occurred, the State Department and other agencies remain in contact with host governments following transfer on these issues. The State Department is engaged in ongoing discussions for the remaining detainees who cannot be repatriated due to post-transfer treatment concerns and is on track to find resettlement countries for most if not all of the detainees in this category.

The State Department also has worked to repatriate detainees to their home countries, in coordination with other agencies and with the National Security Council. Thus far, 24 detainees have been repatriated since last January to nine different locations—Afghanistan, Algeria, Chad, Iraq, Kuwait, Saudi Arabia, Somaliland, the United Kingdom, and Yemen. All decisions to repatriate detainees have been made in

²⁴ From 2002-2008, a total of eight Guantanamo detainees were resettled, all in Albania.

light of the latest intelligence information and with the consent of all relevant agencies. In light of such information, and following the attempted terrorist attack on December 25, 2009, the President announced that repatriations to Yemen would be suspended for the foreseeable future. In addition, the government has adopted enhanced procedures for the implementation of repatriation decisions, requiring a cabinet-level review prior to going forward with any repatriation.

XII. Conclusion

The review process established pursuant to the Executive Order is now complete. The participating agencies have reviewed and unanimously agreed on dispositions for each of the 240 detainees subject to the review. The agencies responsible for the review will continue to handle operational issues involving detainees, including the implementation of the review determinations, and the National Security Council will coordinate the resolution of policy issues pertaining to Guantanamo. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit C

GAO

Report to the Chairman, Select
Committee on Intelligence, U.S. Senate

November 2012

GUANTÁNAMO BAY DETAINEES

Facilities and Factors for Consideration If Detainees Were Brought to the United States



G A O

Accountability * Integrity * Reliability



Highlights of [GAO-13-31](#), a report to the Chairman, Select Committee on Intelligence, U.S. Senate

Why GAO Did This Study

Since 2002, the United States has operated military detention facilities at its Naval Station in Guantánamo Bay, Cuba, to hold individuals detained during overseas counterterrorism operations. In 2009 the President directed the closure of these facilities within 1 year. Since then, a number of statutes have prohibited the transfer of Guantánamo Bay detainees to the United States. GAO was asked to review existing U.S. facilities and identify factors to be considered in the event that restrictions were lifted and Guantánamo Bay detainees were transferred to the United States. This report describes the (1) current Guantánamo Bay detention facilities and infrastructure, (2) DOD corrections facilities and factors to be considered if these facilities were used to hold the detainees, and (3) DOJ facilities holding individuals charged with or convicted of terrorism-related crimes, and factors to be considered if these facilities were used to hold the detainees.

To conduct its work, GAO reviewed relevant laws and policies on detention operations; visited several facilities at Guantánamo Bay and DOD and DOJ sites in the United States selected for their range of housing configurations; and interviewed officials at both agencies. GAO's review is descriptive and did not include an evaluation of whether specific U.S. facilities would be suitable for holding Guantánamo Bay detainees, nor did GAO address legal factors that are still being adjudicated. GAO is not making any recommendations in this report. In commenting on this report, DOJ stated that it has no plans to transfer detainees to the United States. This report is an unclassified version of a classified report issued in November 2012.

View [GAO-13-31](#). For more information, contact Brian J. Lepore at (202) 512-4523 or leporeb@gao.gov or David C. Maurer at (202) 512-9627 or maurerd@gao.gov.

November 2012

GUANTÁNAMO BAY DETAINEES

Facilities and Factors for Consideration If Detainees Were Brought to the United States

What GAO Found

As of November 2012, the Department of Defense (DOD) held 166 detainees in five separate facilities in conditions ranging from communal living to maximum-security segregated cells that limit detainee interaction. In addition, DOD maintains facilities and infrastructure dedicated to detention support operations. For example, DOD operates an extensive information-technology infrastructure, conducts operations to support the protection of military personnel, and performs other missions at Guantánamo Bay such as securing two courthouses used for military commissions.

Within the United States, DOD operates six corrections facilities that are equipped to confine servicemembers for more than 1 year. On average, as of August 2012, these facilities were operating at about 48 percent capacity, but this varies across different facilities and housing units. GAO identified from interviews with DOD officials and analysis of detention operations documents several factors that would need to be considered in the event that the Guantánamo Bay detainees were transferred to one of DOD's U.S. facilities. The following four factors, among others such as legal and cost considerations, would have to be considered: (1) ensuring compliance with international law and U.S. laws and policies; (2) ensuring the continued safety and security of DOD personnel and the detainees, as well as the general public; (3) collecting intelligence information from the detainees; and (4) maintaining current missions and services provided by the corrections facilities and associated installations. For example, DOD's current ability to minimize risks to the public is attributable to Guantánamo Bay's remote location and limited access, whereas DOD corrections facilities in the United States are generally located on active military installations in close proximity to the general public. Additionally, DOD officials indicated that locating detention operations on an active military installation could present risk to the installation's core operations such as administrative and training operations.

The Department of Justice (DOJ), through its Bureau of Prisons and Marshals Service, uses over 2,000 facilities to hold about 280,000 individuals charged with or convicted of federal crimes. Facilities range from low to high security and provide various conditions of confinement. GAO identified from interviews with DOJ officials and analysis of detention operations documents several factors that would need to be considered in the event that the Guantánamo Bay detainees were transferred to one of DOJ's U.S. facilities. The following three factors, among others such as legal and cost considerations, would have to be considered: (1) formulation of policies and practices for housing the detainees; (2) ensuring the safety of facility personnel, the detainees, and the general public; and (3) identifying adequate space for housing the detainees and maintaining separation of detainees from the current inmate population. For example, according to DOJ officials, existing facilities would need to be modified or current inmates relocated because the Bureau of Prisons and Marshals Service would segregate Guantánamo Bay detainees from the inmate population for security purposes. Also, as of August 2012, system-wide Bureau of Prisons facilities were about 38 percent overcrowded, and holding Guantánamo Bay detainees could require triple bunking of inmates or expansion of facility capacity in order to maintain security for personnel, inmates, and detainees.

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Abbreviations

ADX	U.S. Penitentiary Florence Administrative-Maximum
AUMF	Authorization for Use of Military Force
BOP	Bureau of Prisons
DOD	Department of Defense
DOJ	Department of Justice
Marshals Service	U.S. Marshals Service
UCMJ	Uniform Code of Military Justice

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United States Government Accountability Office
Washington, DC 20548

November 14, 2012

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate

Dear Madam Chairman,

Since January 2002 the United States has operated military detention facilities at its Naval Station in Guantánamo Bay, Cuba, to detain individuals captured during overseas counterterrorism operations. In January 2009, the President issued an Executive Order directing the closure of the Guantánamo Bay detention facilities within one year.¹ Subsequently, in June 2009 the first in a series of appropriations and authorization measures limiting or prohibiting the use of appropriated funds to transfer Guantánamo Bay detainees to the United States was enacted.² You requested that we review existing U.S. federal facilities and identify factors to be considered in the event that Guantánamo Bay detention facilities were closed and legal restrictions on transfer did not continue, and the 166 detainees currently held in these detention facilities were transferred to the United States.³ Accordingly, this report describes (1) current Guantánamo Bay detention facilities and infrastructure; (2) Department of Defense (DOD) corrections facilities in the United States, and factors to be considered if they were used to hold Guantánamo Bay detainees; and (3) Department of Justice (DOJ) corrections facilities in the United States that hold individuals charged with or convicted of terrorism-related crimes, and factors to be considered if they were used to hold Guantánamo Bay detainees.⁴ We are also issuing a classified version of

¹Exec. Order No. 13492, *Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897 (Jan. 22, 2009).

²Pub. L. No. 111-32, § 14103 (2009). See app. II for descriptions of subsequent statutes.

³For purposes of this report, we use the word “detainees” to collectively refer to the individuals currently housed at Guantánamo Bay. As discussed later in the report, the status of these individuals varies.

⁴In providing information addressing these objectives, DOJ and DOD officials stated that the two agencies do not have plans to transfer any Guantánamo Bay detainees to their facilities in the United States and that such transfer is currently prohibited by law.

this report in November 2012. That version includes an additional appendix, which provides a discussion of Guantánamo Bay facilities used for classified operations that would need to be considered if the detainees were transferred to facilities in the United States.

The scope of our work was to provide a descriptive review of the detention facilities and infrastructure at Guantánamo Bay as well as existing corrections facilities in the United States. Hence, our review did not include an evaluation of whether specific U.S. facilities would be suitable for holding Guantánamo Bay detainees, nor did we address legal factors that are still being adjudicated such as detainee habeas corpus rights,⁵ and right to counsel.⁶ In addition we are not making recommendations in this report.

To describe the current Guantánamo Bay detention facilities and infrastructure, we visited the detention and support facilities at the U.S. Naval Station Guantánamo Bay. We also reviewed laws and policies related to DOD's detention operations, an interagency report on detainees' status, and DOD reports on conditions of detention at Guantánamo Bay. In addition, we discussed previous and current detention operations with officials from the Office of the Secretary of Defense, Joint Staff, U.S. Southern Command, Joint Task Force-Guantánamo, American Correctional Association, and another related organization.

To describe DOD corrections facilities in the United States and factors to consider if they were to hold Guantánamo Bay detainees, we reviewed DOD corrections policies and manuals and facility capacity data. We also reviewed analyses conducted in 2009 by DOD as part of its efforts to determine whether its facilities were equipped to conduct detention operations. Because analyses previously conducted by DOD to identify facilities in the United States were based on the assumption that all detention operations—including intelligence operations and military commission support—would remain the same, we maintained this assumption in our description of factors that might be considered in the event that Guantánamo Bay detainees were moved to DOD facilities in

⁵The constitutional privilege to seek a writ of habeas corpus allows a detained person to challenge the legality of his or her detention. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court found that the detainees at Guantánamo Bay have the habeas corpus privilege, and a number of habeas cases are ongoing in the federal courts.

⁶Litigation is ongoing regarding the extent of detainee access to counsel, and other issues.

the United States. We conducted site visits and interviewed officials at DOD corrections facilities, which are operated by the Army and the Navy. We selected three facilities that represent both services' operating procedures and reflect a range of housing configurations, including both segregated and general-population housing units. There are three different types of corrections facilities operated by DOD: (1) Level I facilities, which are used for short-term (under 1-year) and pretrial confinement; (2) Level II facilities—consisting of five joint regional corrections facilities (two operated under the Army, and three under the Navy)—which are used for pretrial confinement and for inmates with sentences of 5 years or fewer; and (3) one Level III facility, which holds inmates with sentences exceeding 5 years and inmates sentenced to death. Because Level I facilities are not intended for long-term confinement, we limited the scope of our review to the Level II and Level III long-term incarceration facilities. In addition, we interviewed officials responsible for management of DOD corrections facilities, including officials from the Office of the Secretary of Defense, Joint Staff, Army Corrections Command, and Bureau of Naval Personnel.

To describe corrections facilities in the United States that hold individuals charged with or convicted of terrorism-related crimes or activities, and factors for consideration if Guantánamo Bay detainees were transferred to DOJ facilities in the United States, we reviewed laws and policies related to Bureau of Prisons (BOP) corrections operations, facility capacity data, and information related to the number and location of inmates under BOP custody who had a history of or connection to terrorism, including those charged with or convicted of terrorism-related crimes.⁷ In addition, we reviewed U.S. Marshals Service (Marshals Service) policies related to facility capacity data and information related to the number and locations of inmates charged with terrorism-related

⁷BOP identified these inmates by including offenders who have been charged with or convicted of either a terrorism offense, such as receiving terrorist training, or an offense with a documented connection to terrorism, such as using the proceeds of criminal activity to support a terrorist group. In addition, regardless of the nature of the offense, BOP included inmates who are engaged in, or are under investigation for engaging in, radicalization and recruitment activities. BOP referred to this entire category of inmates as inmates with a history of or nexus (connection) to terrorism.

crimes in the custody of the Marshals Service.⁸ Also, we interviewed officials from BOP, the Marshals Service, the Office of the Deputy Attorney General, as well as other relevant DOJ component agencies, and we conducted site visits to four facilities selected to reflect diversity in types of housing units and security levels. While it is likely that conditions of confinement and related procedures for the detainees would change if they were moved into DOJ facilities, it is unclear what changes would occur. Thus, for the purposes of this report, when discussing factors for consideration if the detainees were moved to DOJ facilities, we assumed that most conditions and procedures would remain the same. Additionally, we interviewed officials from the Department of Homeland Security. According to Department of Homeland Security officials, its detention facilities are used to detain foreign nationals who are awaiting deportation from the United States, not detainees brought to the United States for law-of-war detention, pretrial detention, or postconviction incarceration; thus we subsequently removed the Department of Homeland Security from the scope of our work. For a full description of our scope and methodology, see appendix I.

We conducted this performance audit from January 2012 to November 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Military Detention

In response to the September 11, 2001, terrorist attacks, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to “use all necessary and appropriate force

⁸Among other missions, the Marshals Service is responsible for housing and transporting all federal prisoners from the time they enter federal custody until the time they are acquitted or convicted and delivered to their designated facility. While the Marshals Service does not classify individuals in their custody as having terrorism-related charges, they used other sources, including media reports and the nature of the pending charges, to identify individuals in their custody who might be considered to have such charges.

against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.⁹ Subsequently, many individuals detained during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantánamo Bay, Cuba—a site designated by the administration for long-term military detention operations under the authority of the AUMF and in accordance with international law. Approximately 1,800 servicemembers, civilian employees, and contractors support detention operations at Guantánamo Bay. An additional 4,200 individuals support other missions at Guantánamo Bay, including logistics and regional contingency operations, as it is the only U.S. naval station in the U.S. Southern Command area of responsibility.¹⁰ The Naval Station encompasses 45 square miles on both sides of Guantánamo Bay, sharing a 17-mile border with Cuba. (See fig. 1.)

⁹Pub. L. No. 107-40 (2001).

¹⁰U.S. Southern Command operates in Central America, the Caribbean, and South America and is one of the six geographic combatant commands included within DOD.

Figure 1: Location of U.S. Naval Station at Guantánamo Bay, Cuba

Source: DOD; Map Resources (map).

According to DOD officials, the installation's remote location enables DOD to limit aircraft flights and control maritime access points, and consequently provides an additional layer of security for the detention operations. DOD considers most of the individuals held in custody at Guantánamo Bay to be "unprivileged enemy belligerents" under U.S. and international law.¹¹ Those detainees are afforded certain legal rights and protections under both international law and U.S. law. For example,

¹¹Section 948a of title 10, U.S. Code, defines an "unprivileged enemy belligerent" as "an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter."

Executive Order 13492 states that custody at Guantánamo Bay shall conform with Common Article 3 of the Geneva Conventions, which, among other things, prohibits “outrages upon personal dignity” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹² In addition, various U.S. laws, including the Detainee Treatment Act¹³ and the Military Commissions Act,¹⁴ govern aspects of detainee treatment and trial. The President’s January 2009 order for the closure of Guantánamo Bay detention facilities directed the Secretary of Defense to undertake a review of the conditions of detention at Guantánamo Bay, and this review, known as the “Walsh Report,” reported that the conditions of confinement at Guantánamo Bay conformed with Common Article 3 of the Geneva Conventions.¹⁵ According to DOD, the purpose of military detention is to remove enemy armed forces from the battlefield, as opposed to criminal incarceration, which is a punitive measure for individuals convicted of violating domestic law.

Under the authority of the AUMF, DOD has since January 2002 detained a total of 779 detainees at Guantánamo Bay. The detainee population peaked at approximately 680 in June 2003, and the last detainee to arrive was transferred to Guantánamo Bay in March 2008. The U.S. government, through an interagency task force, has ongoing efforts to transfer detainees from Guantánamo Bay to other countries and, since January 2002, has transferred more than 600 detainees, either to their

¹²“Common Article 3” refers to Article 3 of each of the four Geneva Conventions of 1949 (including, for example, the Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316). In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that Common Article 3 applies to the armed conflict between the United States and al Qaeda.

¹³Two substantially similar versions of the Detainee Treatment Act of 2005 were enacted, as title X of Pub. L. No. 109-148 (2005) and title XIV of Pub. L. No. 109-163 (2006).

¹⁴The Military Commissions Act of 2006, Pub. L. No. 109-366, was later amended by the Military Commissions Act of 2009, enacted as part of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, div. A, title XVIII (2009) (codified at 10 U.S.C. § 948a, et seq.).

¹⁵DOD, *Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement* (Washington, D.C.: February 2009).

home country or to a third country.¹⁶ In addition, in 2009, one detainee was transferred to the United States for trial and, in 2010, was convicted in a U.S. civilian court. He is currently serving a life sentence in a BOP facility in Florence, Colorado.

As of November 2012, 166 detainees were being held in military detention at Guantánamo Bay. Also, as of November 2012, 3 of these detainees had been convicted of crimes by military commissions at Guantánamo Bay.¹⁷ Additionally, 7 detainees—including the 5 individuals accused of planning the September 11 attacks—have charges pending and face potential trial by military commissions.¹⁸ According to DOD officials, the U.S. government, through an interagency task force, is currently negotiating with other countries to transfer more than one-third of the remaining 156 detainees.¹⁹ Table 1 reflects the current detention and prosecution status of all detainees held at Guantánamo Bay as of November 2012.

¹⁶One hundred twenty-one of the detainees who have left Guantánamo Bay have been sent to the Kingdom of Saudi Arabia to participate in programs to reeducate them and integrate them back into society. For additional information on Saudi Arabia's rehabilitation program, see GAO, *Combating Terrorism: U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed*, [GAO-09-883](http://www.gao.gov/media/video/gao-09-883) (Washington, D.C.: Sept. 24, 2009). For a video of GAO interviews with a former Guantánamo Bay detainee, see <http://www.gao.gov/media/video/gao-09-883>.

¹⁷As of November 2012, in addition to the three convicted detainees at Guantánamo Bay, four other detainees had been convicted by military commissions and subsequently transferred to other countries. In October 2012, one of the convicted detainees who had been transferred to another country had his conviction overturned by the U.S. Court of Appeals for the D.C. Circuit. Of the three remaining at Guantánamo Bay, one has an appeal pending with the D.C. Circuit.

¹⁸Six of those with charges pending have been referred to a commission for trial, while one has had charges sworn by prosecutors but has not yet been referred to a commission for trial.

¹⁹These potential transfers are subject to legal limitations, including potential certification requirements and prohibitions on transfers to certain countries. See, for example, section 1028 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (2011).

Table 1: Detainee Detention and Prosecution Status as of November 2012

Status	Description of status	Number of detainees
Currently in Transfer Negotiations	Detainees for whom the U.S. Department of State is in current or planned negotiations with the detainees' home or third country for transfer. These detainees are not currently facing prosecution.	56
Continued Detention under the AUMF	Detainees who have been determined to require continued detention to protect against a significant threat to the security of the United States. These detainees are not currently facing prosecution.	46
Conditional Detention	Detainees from Yemen who will not be transferred until one of the following is satisfied (1) the security situation improves in Yemen, (2) appropriate rehabilitation programs become available, or (3) appropriate third-country resettlement options become available. ^a These detainees are not currently facing prosecution.	30
Possible Prosecution Pending	Detainees whose cases are under review in accordance with a joint DOD-DOJ protocol to determine if a case is feasible for prosecution and, if so, the appropriate forum and venue for that prosecution. ^b	24
Currently Facing Prosecution	Detainees with military commission charges pending.	7
Convicted	Detainees convicted through a military commission process at Guantánamo Bay.	3
Total		166

Sources: DOD, DOJ, and Guantánamo Review Task Force.

^aNot all detainees from Yemen are in Conditional Detention status. These conditions were specified in the final report of the Guantánamo Review Task Force, issued pursuant to Executive Order 13492. Guantánamo Review Task Force, *Final Report* (Jan. 22, 2010). They do not necessarily reflect subsequent legal restrictions on transfers, such as those described in footnote 19. Additionally, while all detainees facing conditional detention are from Yemen, they do not represent all detainees from Yemen currently held at Guantánamo Bay.

^bDOD and DOJ, *Determination of Guantánamo Cases referred for Prosecution* (undated).

Roles of the Federal Agencies in Detention and Incarceration

Executive Order 13492, signed by the President on January 22, 2009, directed the closure of the detention facilities at Guantánamo Bay within a year and stated that any individuals who remained in detention at Guantánamo Bay at the time of the closure of its facilities “shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.” Following the issuance of this Executive Order, an interagency working group including officials from DOD, DOJ, and the Department of Homeland Security began to identify existing facilities in the United States that could be used for continued military detention if the

decision was made to transfer detainees to the United States.²⁰ Each of these departments operates confinement facilities in the United States, consistent with its missions and legal authorities.

- DOD operates a system of corrections facilities in the United States that are used for pretrial detention and incarceration of members of the U.S. armed forces who are charged with or convicted of violations of the Uniform Code of Military Justice (UCMJ).²¹
- DOJ, through BOP, operates a system of corrections facilities in the United States that are used for pretrial detention and incarceration of individuals convicted of violating federal laws. BOP's mission is to confine federal inmates in the controlled, safe, secure, humane, and cost-efficient environments of prisons and community-based facilities, and to provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. DOJ's Marshals Service is the enforcement arm of the federal court system and its mission includes responsibility for the custody of pretrial federal inmates until they are acquitted or convicted, and delivered to the designated BOP facility.
- The Department of Homeland Security operates a system of detention facilities to detain noncitizens who may be subject to removal from the United States under U.S. immigration laws.

According to DOD attorneys, DOD, under the AUMF, has legal authority to maintain custody of the detainees currently at Guantánamo Bay. A DOJ official from the Office of the Deputy Attorney General stated that DOJ would likely need additional authorities to detain law-of-war detainees for continued detention at BOP facilities, but indicated that he was unaware of any analysis of the issue because DOJ is not evaluating transferring detainees to the United States in light of transfer restrictions. With respect to the three detainees who have been convicted of crimes by military commissions, the Military Commissions Act provides that, "[u]nder such regulations as the Secretary of Defense may prescribe, a

²⁰These efforts ceased after restrictions, beginning in June 2009, were imposed on the transfer of detainees to the United States.

²¹The UCMJ is a collection of statutes that govern the military justice system, and is codified in Title 10 of the United States Code. UCMJ includes punitive articles that define specific offenses similar to those found in civilian criminal law (e.g., murder, rape, wrongful use of controlled substances, larceny, and drunk driving) as well as other offenses that specifically affect good order and discipline in the military (e.g., absence without leave, disrespect toward superior commissioned officer, or dereliction of duty).

sentence of confinement adjudged by a military commission...may be carried into execution by confinement ...in any penal or correctional institution under the control of the United States.”²² However, while this statute indicates that the three convicted detainees serving sentences at Guantánamo Bay could potentially be confined in DOJ or other U.S. controlled facilities, BOP officials said that BOP would need additional statutory authority in the federal criminal code to take custody of individuals convicted by military commission, like the authority it currently has to confine persons convicted by courts-martial.²³ In addition to the above-mentioned legal authorities, since the signing of Executive Order 13492 in January 2009, a number of statutes have limited or prohibited the use of federal funds to transfer or assist in the transfer of Guantánamo Bay detainees to U.S. facilities. See appendix II for a summary of key statutes. Prior to the enactment of these statutes, in June 2009, one Guantánamo Bay detainee was formally charged with crimes by DOJ and subsequently transferred to the United States. This detainee was transferred by DOD into the custody of the Marshals Service to stand trial in the United States. In November 2010 he was convicted by a federal court, and is currently serving a life sentence in a BOP facility in Colorado.

History of Detention Facilities and Standards of Confinement at Guantánamo Bay

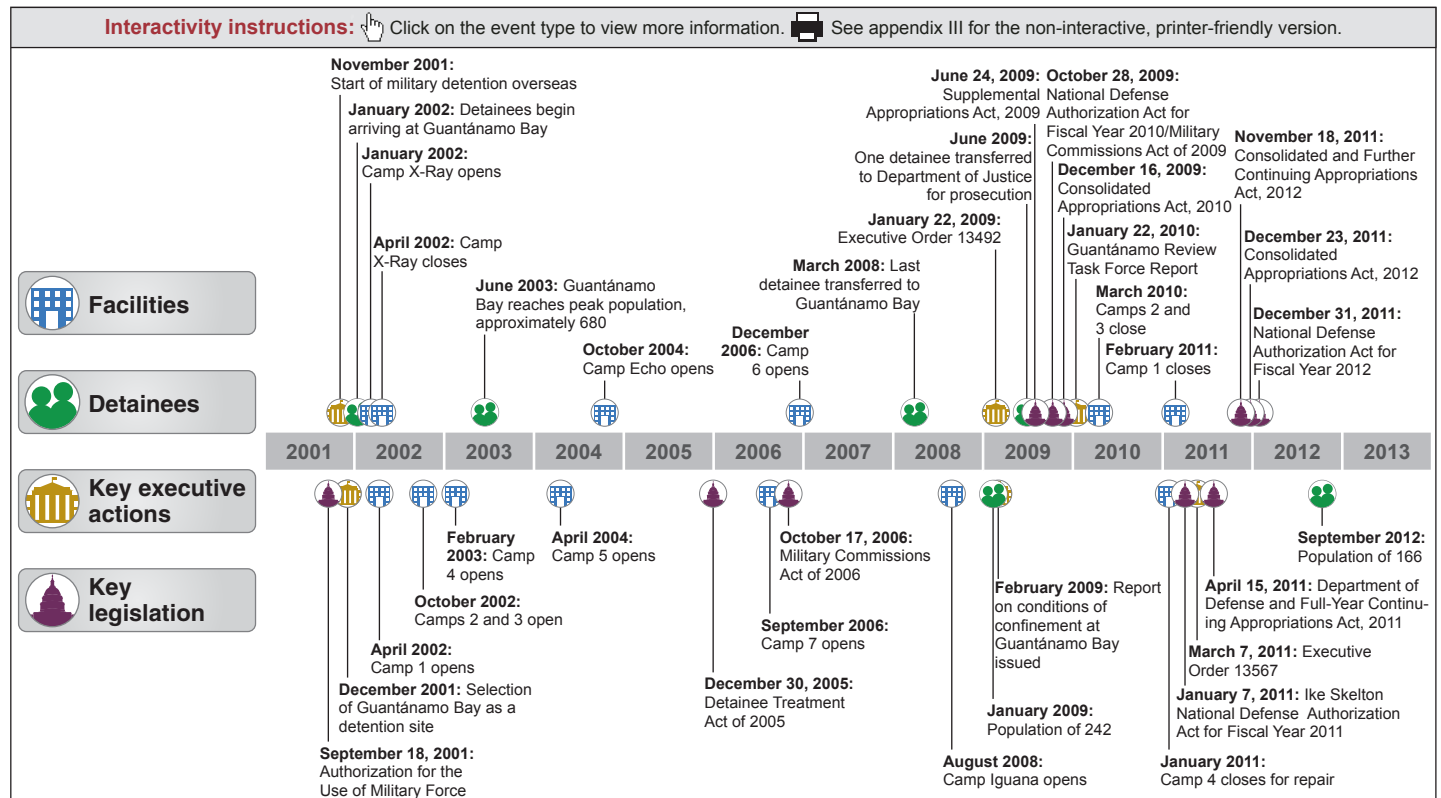
Over time, DOD’s detention facilities at Guantánamo Bay have evolved as the department has constructed new facilities and closed older ones in response to changes in the size of the detainee population. The original facilities—known as Camp X-Ray—were open for 92 days (in 2002). They were preexisting migrant-detention facilities comprised of chain-link enclosures on concrete slabs. Subsequent facilities, called Camps 1, 2, 3, and 4, were built in response to increases in the detainee population and the need to segregate different groups of detainees; for example, individuals who were compliant with facility rules were separated from

²²10 U.S.C. § 949u.

²³18 U.S.C. § 4083 (“Persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary.”). BOP officials noted that under this statute and article 58 of the UCMJ (10 U.S.C. § 858), which provides that “a sentence of confinement adjudged by a court-martial or other military tribunal ... may be carried into execution by confinement ... in any penal or correctional institution under the control of the United States ...”, as well as a memorandum of understanding with DOD, BOP houses convicted military uniformed service personnel, who have been formally discharged from their respective service.

those who were noncompliant. These early facilities were generally covered, open-air, single-cell structures with steel mesh walls. DOD subsequently constructed the indoor, climate-controlled facilities that are currently in use. As shown under the Facilities tab in figure 2, a total of 10 different detention facilities have been used to hold Guantánamo Bay detainees (see app. III for the noninteractive version of this figure). Of these, 5 are currently in use: Camp Echo, Camp Iguana, and Camps 5, 6, and 7.

Figure 2: Timeline of Guantánamo Bay Detention Operations



Source: DOD, DOJ, and GAO analysis of select executive and legislative actions.

In September 2006, DOD revised DOD Directive 2310.01E, its policy regarding standards for detainee treatment.²⁴ The standards outlined in the directive ensure that military detainees are treated humanely and in conformity with “the laws of the United States, the law[s] of war, including the Geneva Conventions of 1949, and all applicable policies, directives, or other issuances” According to DOD officials, as long as Guantánamo Bay detainees maintain their legal status as military detainees held under the authority of AUMF and remain in DOD custody, DOD’s detention directive and all related laws and standards would continue to be applicable to the Guantánamo Bay detainees if they were transferred to the United States.

Characteristics of the Current Guantánamo Bay Detention Facilities and Infrastructure

DOD currently conducts extensive detention operations at Guantánamo Bay, operating multiple facilities that hold detainees and support other detainee-related missions, such as medical services. In addition, DOD maintains facilities and infrastructure dedicated to detention support operations.²⁵ For example, DOD operates an extensive information-technology infrastructure to support force protection and other missions, and maintains and secures legal facilities.

Overview of Current Detention Facilities at Guantánamo Bay

As of November 2012, DOD held 166 detainees in five detention facilities on its Naval Station in Guantánamo Bay, Cuba. According to DOD officials, all facilities currently in use were designed on the basis of facilities in the United States that meet American Correctional Association

²⁴Department of Defense Directive 2310.01E, *Department of Defense Detainee Program* (Sept. 5, 2006). This directive states that all detainees, regardless of status, will at a minimum receive treatment consistent with Common Article 3 to the Geneva Conventions of 1949. This includes prohibitions on violence, taking of hostages, humiliating or degrading treatment, and the sentencing and carrying out of executions without a court judgment; provision of care for the wounded and sick; and provision of services by an impartial humanitarian organization, such as the International Committee of the Red Cross.

²⁵A discussion of facilities used for classified operations can be found in the classified version of this report.

standards.²⁶ The facilities differ in configuration and detainee population, and DOD generally places detainees in facilities according to a detainee's compliance with facility rules.²⁷ See table 2 for a description of each detention facility. DOD also provides medical, dental, and behavioral health services in some of the detention facilities and in separate dedicated facilities.

Table 2: Guantánamo Bay Detention Facilities as of November 2012

Facility name	Description of facility	Nonsegregated population	Segregated population
Camp 5	Four housing units containing single-occupancy cells for noncompliant detainees and prisoners. One shared housing unit.	1-20	10-30
Camp 6	Eight shared housing units.	110-130	0
Camp 7	Segregated single-cell facility, used for high-value detainees.	0	10-20
Camp Echo	Single-occupant structures, with shared recreation area.	5-10	0
Camp Iguana	Communal structures shared by detainees who have been designated for release.	1-5	0

Source: GAO representation of DOD data.

Note: Populations of Camps 5, 6, Echo, and Iguana are presented as ranges because specific numbers of detainees in these camps can change over time as detainees are released or moved between facilities. The specific number of detainees in Camp 7 can be found in the classified version of this report.

²⁶The American Correctional Association's Commission on Accreditation provides all accreditations for BOP institutions. The American Correctional Association's standards provide guidance to all correctional organizations on correctional issues such as programming, officer staffing, and officer safety, as well as physical standards such as inmate housing, environmental conditions, and exercise and recreation areas. However, the Guantánamo Bay detention facilities themselves have not been evaluated or accredited by the American Correctional Association.

²⁷An exception to this practice is the small group of detainees deemed to be "high-value," who are housed separately from each other and from the other facilities at Guantánamo Bay regardless of compliance with facility rules.

Camp 5

Camp 5 is the second-most populous detention facility at Guantánamo Bay—approximately one-fourth of detainees reside there at any given time. It is a maximum-security facility consisting of 100 indoor climate-controlled cells divided among four individual cell blocks, each with two tiers, and 24 open-air cells. Most of the cell blocks in Camp 5 are operated as segregated housing. One block currently serves as shared housing. DOD holds three types of detainees in Camp 5:

(1) Most of the detainees in Camp 5 are held in segregated cells on a temporary basis to encourage compliance with facility rules. Once these detainees have begun complying with facility rules, they are transferred to one of the other camps having more shared living spaces.

(2) One cell block of Camp 5 houses compliant detainees with similar lifestyle habits in shared housing. DOD finished converting this block to shared housing in May 2012 in order to decrease the number of detainees in another facility. Detainees in the shared housing block can access each other's cells and recreate together, but are separated from the other groups of detainees in Camp 5.

(3) Detainees who have been convicted by military commission at Guantánamo Bay and are serving their sentences there are also held in Camp 5. These convicted individuals are confined to a cell block tier segregated from all other detainees.

Figure 3: A Segregated Housing Unit in Camp 5

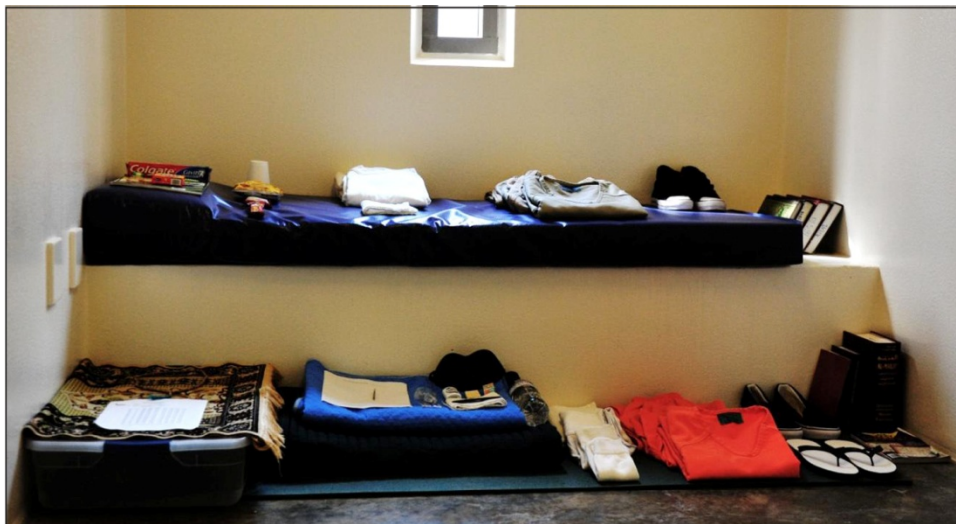


Source: DOD.

In addition to housing units, Camp 5 contains one media room on each tier—consisting of a television for use by one detainee at a time—and three outdoor recreation areas. These secured outdoor recreation areas have exercise equipment but are not large enough for detainees to play games such as soccer. They are designed such that no more than two detainees can be present in the same area at a given time, though detainees may speak with those in adjacent recreation areas. All detainees assigned to segregated housing units in Camp 5 have access

to at least 2 hours of recreation per day with one other detainee; those who have begun complying with facility rules have access to at least 4 hours of recreation per day. All detainees in Camp 5 also have access to books and magazines, and compliant detainees may obtain a greater number of books as well as additional clothing choices. Detainees in the shared housing unit are provided other privileges as well, such as the ability to move freely within the tier. Camp 5 also contains a medical treatment room and a dental chair.

Figure 4: Example of a Camp 5 Cell and Detainee Comfort Items



Source: DOD.

Note: All detainees receive basic comfort supplies, such as soap, toothpaste, clothing, and religious items. Compliant detainees receive additional clothing and footwear choices and other incentives.

Camp 6

Camp 6 is the most-populous detention facility at Guantánamo Bay—about two-thirds of detainees are held there. It is a medium-security detention camp designed after the layout of a U.S. county jail, and it consists of eight indoor climate-controlled, two-story housing units that each contain 22 individual cells and one large common area. Within each housing unit, two cells are reserved for use as a shared pantry and library. DOD generally assigns detainees to specific housing units according to cultural and lifestyle preferences. For example, detainees of the same nationality or detainees who have similar television-viewing preferences may share a housing unit.

Figure 5: Example of a Housing Unit in Camp 6



Source: DOD.

Detainees in Camp 6 are allowed access to one adjacent housing unit as well as their own unit. Adjacent housing units are connected by a secured, shared outdoor recreation yard with exercise equipment and an area for the detainees to play sports such as basketball or soccer. Except for DOD inspection times, during which detainees are confined to their cells, detainees can move freely for 20 hours per day in the recreation yard and the adjacent housing unit; they are confined to their assigned housing unit the remaining 4 hours per day. Camp 6 also includes

medical and dental treatment rooms and staff to provide routine medical care and medication dispensation.

Camp 7, Camp Echo, and Camp Iguana

DOD operates three additional facilities to house certain small groups of detainees: Camp 7, Camp Echo, and Camp Iguana. Camp 7 holds “high-value” detainees, such as those accused of planning the September 11 attacks. These individuals are held in climate-controlled segregated housing units that limit their ability to communicate with each other. Detainees in Camp 7 have access to up to 4 hours of recreation per day in secured recreation areas containing exercise equipment; two detainees may have outdoor recreation at the same time in separate but adjacent recreation areas. In addition, Camp 7 contains a medical treatment room and a dental chair. The other two facilities—Camp Echo and Camp Iguana—house compliant detainees in shared settings. Detainees whose personal security would be at risk if they were housed in Camp 6 are assigned to Camp Echo, and detainees who have been designated for release from Guantánamo Bay are assigned to Camp Iguana.²⁸ These camps are isolated from each other and from the other camps. Camp Echo consists of 10 wooden hut-like structures, with each detainee’s housing unit containing a sleeping cell and a personal living area. Detainees assigned to Camp Echo may recreate together up to 20 hours per day. DOD uses unoccupied structures at the Camp Echo facility to support other detention-related operations, such as detainee-attorney meetings. Camp Iguana is a communal space that consists of multiple wooden hut-like structures within a secured fenced area. The detainees can move freely within the fenced area at all times, and they use the structures for a variety of purposes, including sleeping, cooking, laundry, and recreation. Although detainees in Camps Echo and Iguana are afforded more privileges than other detainees, they must continue to comply with facility rules or they may be temporarily placed in Camp 5 to encourage compliance.

Medical, Dental, and Behavioral Health Facilities

In addition to detention facilities, DOD operates several facilities that provide medical, dental, and behavioral health care to detainees. In addition to medical treatment rooms at Camps 5, 6, and 7, DOD operates a hospital dedicated to detainee care. The detainee hospital is primarily an in-patient facility with secured cells, but it does provide some outpatient care such as radiology, surgery, dental, and other medical

²⁸As of November 2012, DOD has designated three detainees for release, but the detainees have so far refused offers from third countries willing to receive them.

services. If necessary, the detainee hospital can leverage the resources of the Naval Station hospital, which is located elsewhere on the base. For example, medical staff can perform minor surgery at the detainee hospital, but major surgery is performed at the Naval Station hospital. In addition, DOD will bring specialists to Guantánamo Bay to treat detainees if required. Camps 6 and 7 also have dental facilities. Furthermore, DOD operates a 12-bed behavioral health unit in a separate facility, which provides care to detainees with mental health issues. Overall, there are about 100 people who provide medical, dental, or behavioral health care to the detainees, including specialized medical linguists.

Detention Support Operations

In addition to the facilities it uses to house and provide services to detainees, DOD maintains facilities and infrastructure dedicated to detention support operations. These operations include (1) physical security and protection for detainees and U.S. military personnel, (2) intelligence collection and analysis, (3) maintenance and security of military commission courtrooms and other legal support. In addition, DOD provides administrative offices, housing, dining, medical, and other necessary support facilities for the approximately 1,800 detention-operations staff members at Guantánamo Bay. On average, the cost to operate Guantánamo Bay detention facilities and support operations is about \$114 million per year, not including the cost of military personnel or approximately 120 contract linguist staff.²⁹ Some of this funding is dedicated to fixed costs, such as the information-technology infrastructure, and would not change proportionately to changes in detainee population.

Maintaining Physical Security and Protection of Detainees and U.S. Military Personnel

Several facilities at Guantánamo Bay are used to support DOD's operations to maintain physical security and protection of the detainees and U.S. military personnel. For example, in one facility, DOD screens and translates—in up to 13 languages—approximately 400 pieces of incoming and outgoing detainee mail each month; according to officials, this figure can increase to more than 1,000 when officials from the International Committee of the Red Cross visit. All operations at Guantánamo Bay utilize an extensive information-technology infrastructure, comprising several networks, over 2,000 computers, and 190 servers. For example, electronic records of all detention camp activities are stored in a computer database.

²⁹This figure reflects the fiscal years 2008 through 2012 budget data for operation of the five detention facilities currently in use; intelligence and security programs; and the support provided to Naval Station Guantánamo Bay for hosting detention operations.

Moreover, DOD policy requires the preservation of all evidence, documents, and recorded information of every detainee now or ever held at Guantánamo Bay.³⁰ Therefore, DOD maintains facilities to store and preserve a variety of information including (1) all electronic data collected, (2) physical evidence obtained at the time of a detainee's capture, and (3) records of contraband or makeshift weapons seized over the course of detention operations.

Intelligence Collection and Analysis

DOD also operates some facilities at Guantánamo Bay exclusively for the collection of intelligence—through voluntary interviews of detainees—and analysis of this information by linguistic and technical support staff.³¹

According to DOD, it collects this intelligence to provide support to military commissions, Periodic Review Boards,³² the intelligence community, and law-enforcement agencies. According to a 2009 DOD report, given the length of time that most detainees have spent at Guantánamo Bay, the primary focus of the voluntary detainee interviews is to gather information to help ensure the safety and security of the detention facilities and personnel.

Military Commissions and Other Legal Support

DOD maintains and secures two courthouses and several office facilities used in the military-commission process at Guantánamo Bay. In 2008, DOD completed construction of a courtroom complex designed specifically to hold commissions for the five detainees accused of organizing the September 11 attacks. It includes five detainee holding cells and nine areas, including the courtroom and office spaces, in which highly classified information may be discussed. Because the facility was

³⁰Chairman of the Joint Chiefs of Staff Notice 5761, *Preservation of Detainee Records* (Feb. 29, 2008).

³¹DOD is required by law to record all detainee interviews. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1080, 123 Stat. 2190, 2479-81 (2009).

³²In March 2011, the President directed DOD to coordinate a process of periodic review of continued law-of-war detention for detainees. Exec. Order 13567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13277 (Mar. 7, 2011). Section 1023 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (2011), directed DOD to issue procedures for the review boards, and DOD did so in May 2012. Directive-Type Memorandum 12-005, *Implementing Guidelines for Periodic Review of Detainees Held at Guantánamo Bay per Executive Order 13567* (May 9, 2012). According to DOD officials, an interagency task force has begun reviewing detainee files. Review boards will ultimately conduct hearings—at which detainees may participate—and make determinations about whether DOD should continue to detain that individual.

designed to allow the discussion of highly classified information, DOD must secure it 24 hours per day. In addition, DOD operates a separate facility that it converted into a courtroom in 2005. This facility utilizes some of the same technology as the other courtroom but is smaller and is cleared for discussion of classified information at a lower level. The facility includes a holding cell for detainees and rooms for detainees to meet with legal counsel. DOD utilizes advanced videoconferencing and court-reporting technology in both courtrooms and it can broadcast proceedings to an observation area adjacent to the larger courtroom, the media facility at Guantánamo Bay, and remote viewing locations in the United States.

In addition to the courtrooms, there are several administrative facilities dedicated to legal services and upcoming detainee Periodic Review Boards. One facility will enable the use of secure video teleconferencing during upcoming detainee reviews, and the intelligence collection and analysis staff will provide support to assessments of the potential threat posed by each detainee. In addition, DOD maintains a legal office staffed with approximately 10 attorneys to facilitate detainee-attorney meetings, of which there were 132 between November 2011 and April 2012. This office also contributes support to the military commission process.

DOD Corrections Facilities in the United States and Factors to Consider If They Were to Hold Detainees

DOD operates six facilities in the continental United States for confining servicemembers for more than 1 year. Each facility utilizes both general-population and segregated housing units and is equipped to manage inmates at all security levels. On average, as of August 2012, these six facilities were 48 percent occupied. In the event that the Guantánamo Bay detainees were transferred to one of these facilities, and all detention operations were to remain the same as they were at Guantánamo Bay, we identified from interviews with DOD officials and analysis of detention operations documents several factors that would need to be considered, such as ensuring compliance with international law and U.S. laws and policies, and ensuring the safety and security of detainees, DOD personnel, as well as the general public, before the facilities could be used for this purpose.³³

³³A discussion of Guantánamo Bay facilities used for classified operations and related factors that would need to be considered if the detainees were transferred to facilities in the United States can be found in the classified version of this report.

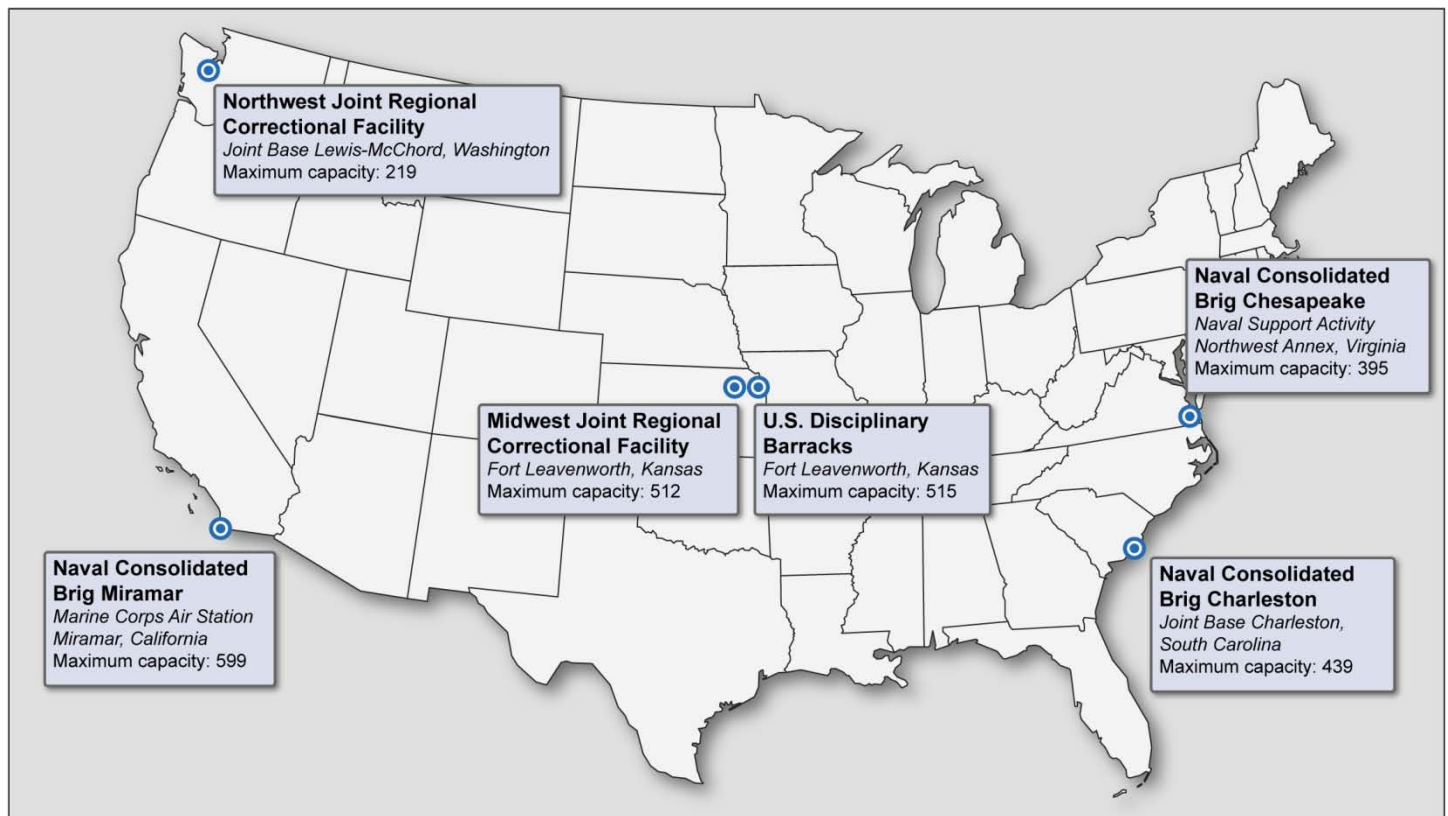
DOD Corrections Facilities in the United States

DOD operates a system of corrections facilities in the continental United States that it uses to confine members of the uniformed services charged with or convicted of violations of the Uniform Code of Military Justice (UCMJ). Six of these facilities, operated by the Army and the Navy, are equipped to confine individuals for more than 1 year.³⁴ Five of the six are joint regional correctional facilities—two Army-operated regional correctional facilities and three Naval consolidated brigs—that are used for pre- and posttrial confinement for inmates with sentences of 5 years or fewer. The sixth is the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, a facility operated by the Army, which holds inmates with sentences exceeding 5 years as well as inmates sentenced to death. Five of these six DOD corrections facilities are accredited by the American Correctional Association, which reaccredits facilities every 3 years to ensure they meet specific national standards related to facility administration and management, physical plant and institutional operations, institutional services, and inmate programs.³⁵ In fiscal year 2011, the cost to operate these facilities ranged from approximately \$1.6 million to \$14 million.³⁶ See figure 6 for the names and locations of the six facilities.

³⁴The facilities are operated by the Army and the Navy, but individuals from any branch of the military can be confined in any facility. DOD also operates facilities that it uses primarily for inmates with sentences of less than 1 year. For the purposes of our review, we did not consider these facilities in our scope.

³⁵At the time of our review, the Naval Consolidated Brig in Chesapeake, Virginia, which opened in August 2011 and had not yet been accredited, was in the accreditation process.

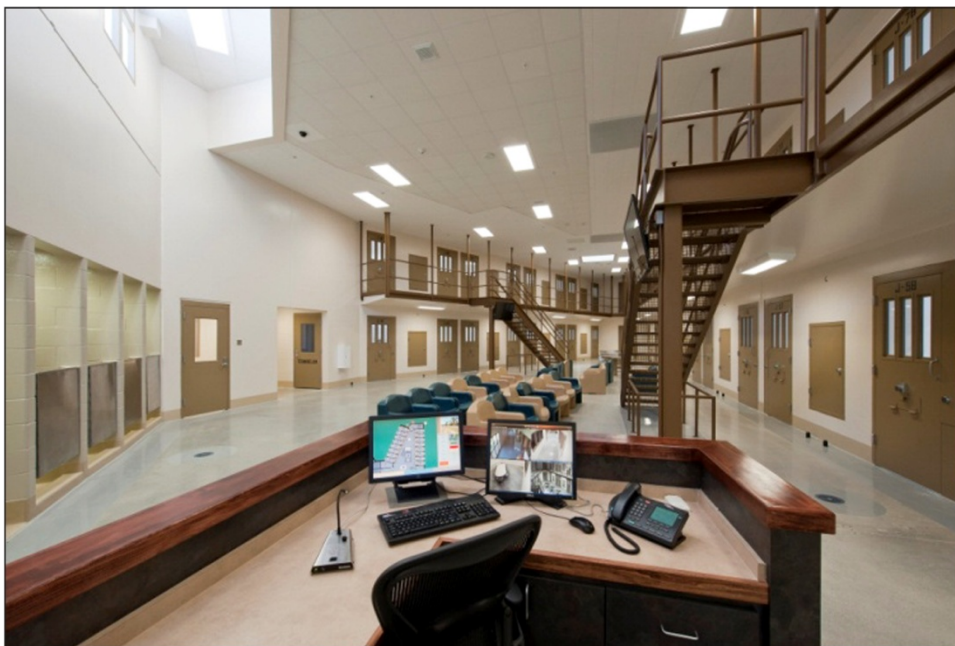
³⁶This figure includes facility operations and civilian personnel costs for fiscal year 2011 for the Northwest Joint Regional Correctional Facility, Naval Consolidated Brig Miramar, Naval Consolidated Brig Charleston, the Midwest Joint Regional Correctional Facility, and U.S. Disciplinary Barracks. Because Naval Consolidated Brig Chesapeake was opened in 2011, historic cost data were not available at the time of this review.

Figure 6: DOD Regional Corrections Facilities and U.S. Disciplinary Barracks

Source: DOD; Map Resources (map).

Each of these facilities comprises both general-population and segregated housing units. Most inmates are housed in general-population housing units. These units are similar in design to the shared housing units in Camp 6 at Guantánamo Bay; they generally include an open space with shared tables, chairs, televisions, telephones, and showers, as well as individual cells containing single or double bunked beds, a toilet, and a sink. Each DOD facility has multiple general-population housing units, and while capacity of these units varies, typically general-population units can be configured to hold up to 80 inmates; Navy officials indicated that when possible they prefer to maintain capacity at 40 inmates. Depending on the facilities' operating procedures and individual inmates' compliance with facility rules, the amount of time inmates in general-population housing units are required to spend in their cells varies, as does their access to the shared living space. See figure 7 for a photographic example of a general-population housing unit.

Figure 7: Sample General-Population Housing Unit, Naval Consolidated Brig Chesapeake, Virginia



Source: DOD.

Unlike general-population housing units, segregated housing units prevent inmate interaction, and they do not have a shared living space. Inmates in segregated units are individually bunked and confined to their cells for the majority of their time. Similar to the segregated housing units in Camp 5 at Guantánamo Bay, these cells are used primarily as a temporary administrative or disciplinary measure for inmates who are noncompliant with facility rules, who may be a danger to themselves or others, or who may be at risk of harm from other inmates. Segregated housing units can also be used as long-term housing for inmates who have been classified as needing maximum security.

These six DOD facilities are required to manage inmates at all security levels. When sentenced to a facility, inmates are assessed and assigned

a security custody classification.³⁷ These classifications range from individuals who require limited supervision and maintain jobs outside of the facility to the most-maximum-security inmates who present the highest risk of violence. An inmate's security classification is the basis upon which he or she is assigned to a housing unit—for example, medium-custody inmates are housed with other medium-custody inmates. DOD policy allows for an inmate classification to be reviewed and for inmates to be reclassified, if appropriate; thus housing-unit security designations can change over time. An inmate's classification can also change as needed based on compliance with facility rules. These six facilities have the ability to secure inmates requiring additional controls such as protective custody or restricted communications; for example, the Midwest Joint Regional Correctional Facility at Ft. Leavenworth has eight specialized soundproof cells within its segregated housing unit that can be used for individuals charged with high-profile crimes in order to limit their communications with other inmates.

These six facilities also have space and infrastructure dedicated to facility support operations and inmate programs, including administrative offices and staff rooms; rooms used to facilitate legal and general visits; and on-site medical, dental, and behavioral health facilities, although inmates requiring advanced care are transported to separate military or civilian medical facilities. In addition, these facilities include classrooms for educational, treatment, and other group programs; space for religious services; dining areas; shops for work programs (for example, wood and textile shops); and indoor and outdoor recreation spaces. An inmate's freedom of movement around a facility is also based on his or her security custody classification; for example, inmates requiring minimum security may move throughout the facility unescorted on an as-needed basis, whereas inmates classified as needing maximum security require restraints and two escorts when moving throughout a facility.

³⁷ Army standards require that this classification be based on several factors including, at a minimum, the individual prisoner's offense, attitude, aptitude, intelligence, personality, adaptation to incarceration, record of performance prior to incarceration, and potential for further military service.

Factors to Consider If the Guantánamo Bay Detainees Were to Be Held in DOD Corrections Facilities in the United States

On the basis of our interviews with DOD officials and analyses of detention operation documents, we identified several factors that would have to be considered in the event that the Guantánamo Bay detainees were transferred to existing DOD facilities within the United States. According to DOD's 2009 plan and DOD officials we interviewed, if detainees were transferred to DOD facilities in the United States, DOD would plan on providing all of the same detention and support operations in U.S. facilities that are currently maintained at Guantánamo Bay. While there is available capacity to house the 166 Guantánamo Bay detainees across the six DOD facilities included in our scope if detention operations remained the same (see table 3), the following four factors, among others such as legal and cost considerations, would also have to be considered: (1) ensuring compliance with international law and U.S. laws and policies; (2) ensuring the continued safety and security of DOD personnel and the detainees, as well as the general public; (3) conducting intelligence operations; and (4) maintaining current missions and services provided by the corrections facilities and associated installations.

Table 3: Capacity of DOD Level II and III Corrections Facilities as of August 2012

	Maximum capacity	Current inmates	Available capacity	Percent occupied
Naval Consolidated Brig Chesapeake, VA ^a	395	78	317	20%
Naval Consolidated Brig Charleston, SC	439	102	337	23
Naval Consolidated Brig Miramar, CA	599	310	289	52
Midwest Joint Regional Correctional Facility, Ft. Leavenworth, KS	512	215	297	42
Northwest Joint Regional Correctional Facility, Joint Base Lewis-McChord, WA	219	123	96	56
United States Disciplinary Barracks, Ft. Leavenworth, KS ^b	515	449	66	87
Total	2,679	1,277	1,402	48%

Source: GAO analysis of DOD data.

^aThe Naval Consolidated Brig in Chesapeake, Virginia, opened in July 2011 as a result of the Defense Base Closure and Realignment Commission process. While it was built as a Level II facility, at the time of our review it was being used as a Level I facility. Level I facilities are for inmates serving sentences up to 1 year, while Level II facilities are for inmates serving sentences of 5 years or fewer.

^bIn 1994, the Army entered into a memorandum of agreement with the BOP to provide space in BOP facilities for 500 UCMJ inmates. According to DOD officials, as of April 2012 there were about 300 UCMJ inmates being held in BOP facilities.

First, U.S. law prohibits the confinement of members of the armed forces in “immediate association” with foreign nationals.³⁸ To comply with this law, DOD would need to relocate UCMJ inmates if detainees were to be moved to existing facilities. Since this provision in the law does not define “immediate association,” UCMJ inmates could potentially be relocated among multiple facilities, or within a specific facility, according to DOD officials. Additionally, according to DOD officials, for operational and policy reasons DOD prohibits the commingling of unprivileged enemy belligerents with those convicted of crimes, as seen in its holding of three detainees under AUMF authority in the United States. For example, DOD held one former Guantánamo Bay detainee at the former Naval Brig Norfolk—which is now closed—and subsequently transferred him to Naval Consolidated Brig Charleston. DOD officials told us that although this individual was a U.S. citizen, because he was taken into custody under AUMF authority he was therefore segregated from all UCMJ inmates until his transfer to another country.³⁹ According to officials, DOD did not relocate inmates to another facility, but instead segregated this detainee from all UCMJ inmates at all times. DOD would also have to ensure that it maintained separation of detainees and UCMJ inmates while still conforming to international and U.S. standards for access to medical care and recreation. According to DOD officials, provision of on-site medical care for detainees might present a challenge. All DOD corrections facilities provide medical services on site, although, they are limited in what they are equipped to provide. As a result, UCMJ inmates requiring more-complex medical treatments are transported to clinics or hospitals, but that might be challenging were Guantánamo Bay detainees to be treated in this way in the United States.

While UCMJ inmates have in the past been colocated in the same facilities with a few AUMF detainees, the current configuration of these six facilities may not easily accommodate the 166 currently held at

³⁸10 U.S.C. § 812. “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.” All of the Guantánamo Bay detainees are foreign nationals.

³⁹This individual was born in the United States, and subsequent to his detention he gave up his citizenship and was transferred to Saudi Arabia. In addition to the former Guantánamo Bay detainee, DOD held two other individuals in its U.S. facilities under AUMF authority. Neither of these individuals was ever detained at Guantánamo Bay, and according to DOD officials, in both cases they were fully segregated from UCMJ inmates until they were charged with federal crimes and transferred to DOJ custody.

Guantánamo Bay. In particular this is because DOD's policies for separating different categories of inmates and detainees may present capacity limitations. DOD policies require that within the same facility UCMJ inmates of different gender and security custody classifications maintain separate hygiene and sleeping areas, including additional segregation for those inmates requiring additional controls.⁴⁰ DOD's Guantánamo Bay standard operating procedures also call for segregating different categories of detainees from each other. According to DOD, the practice of segregating different categories of Guantánamo Bay detainees from each other would also be maintained if detainees were transferred to DOD facilities in the United States. Currently at Guantánamo Bay the following three categories of detainees are confined separately from one another, and from all other detainees: (1) detainees designated for release, (2) "high-value" detainees, and (3) detainees who have been convicted by military commissions.

Second, according to DOD officials, if detainees were moved to its U.S. facilities, DOD would need to continue to ensure the safety and security of DOD personnel and the detainees, as well as ensure the safety and security of the general public located in close proximity to these facilities. According to DOD, maintaining the safety and security of its personnel and the detainees is a key mission area at Guantánamo Bay. For example, as we observed during our visit to Guantánamo Bay, DOD takes several precautions to safeguard its personnel's identities from the detainees in an effort to prevent any harm from coming to personnel or their families, and to minimize any attempt by the detainees to compromise DOD's detention operations. In DOD corrections facilities, however, personnel and inmates typically interact regularly throughout the course of the day. Additionally, in order to conform with international law and DOD policies, detainees are to be treated humanely and protected from public curiosity (for example, pictures of detainees' faces are not disseminated publicly). According to DOD's 2009 analysis, four of the six facilities in our review—the two Ft. Leavenworth facilities and the Miramar and Charleston brigs—are in public view and this could present a disadvantage. For example, the general public might be able to view detainees utilizing the outdoor recreation areas, or detainee privacy and

⁴⁰Housing for all female inmates in the DOD prison system is located in the Naval Consolidated Brig in Chesapeake, Virginia—which houses females with sentences not exceeding 5 years—and the Naval Consolidated Brig in Miramar, California—which houses females with sentences over 5 years.

personnel anonymity may be compromised when transporting detainees off-site for medical care.

Moving the detainees to DOD's U.S. facilities would also necessitate the development of operations to ensure the safety of the general public. According to DOD officials, the physical location of the detainees could become a target for individuals and groups intent on harming the detainees, or harming the U.S. military personnel involved in detention operations—which could result in unintended harm to the general public. DOD's current ability to minimize risks to the public is attributable to Guantánamo Bay's remote location and limited access, whereas DOD's corrections facilities in the United States are generally located on active military installations in close proximity to the general public. Further, because the only access to Naval Station Guantánamo Bay is by military approved flights (including both military flights and commercial flights contracted by DOD) or ships, all visitors are cleared in advance of their arrival. If detainees were colocated with UCMJ inmates, according to DOD corrections officials, DOD may not be able to maintain similar control over facility access, specifically because UCMJ inmates are permitted visits from family and friends, and access to U.S. military installations is not as restricted as access to the installation at Guantánamo Bay. DOD may also need to consider increased risk when transporting detainees outside of the facility.

Third, if DOD were to continue to conduct intelligence operations similar to those conducted at Guantánamo Bay, according to DOD officials, this could require facilities and infrastructure that may not be readily available at existing U.S. DOD facilities. For example, DOD would require secure facilities equipped with recording equipment for conducting detainee interviews, as well as secure workspaces for intelligence personnel, documents, and equipment. According to DOD officials, its intelligence costs might increase if the detainees were moved from Guantánamo Bay to the United States. That is because most intelligence information collected at Guantánamo Bay from the detainees is used to ensure the protection of U.S. military personnel, and relocating the detainees to a U.S. facility, with more exposure than Guantánamo Bay, may increase the need for greater protective measures resulting in additional costs to implement such measures.

Fourth, inmates at U.S. DOD facilities provide services to DOD, and these and other operations performed on the installation would be affected by moving Guantánamo Bay detainees to an existing DOD facility. According to DOD, if DOD were to move all UCMJ inmates from a facility it might

also have to relocate work programs such as graphic arts, woodworking, as well as textile repair and embroidery for all Army uniforms and related gear. According to DOD, in fiscal year 2011 provision of these services by inmates at the U.S. Disciplinary Barracks resulted in almost \$15 million in offset savings. Additionally, according to DOD, locating detention operations on an active military installation could present risk to the installation's enduring base operations such as administrative and training operations. For example, Ft. Leavenworth is home to the Joint Center for International Security Force Assistance, and it hosts international officials. According to DOD officials, the objection of several foreign nations to the Guantánamo Bay detention operations could affect these international exchanges.

DOJ Corrections Facilities in the United States and Factors to Consider If They Were to Hold Detainees

DOJ, through BOP and the Marshals Service, uses over 2,000 federal, state, local, and private facilities to hold about 280,000 individuals charged with or convicted of violating federal laws.⁴¹ Under current U.S. law, DOJ does not consider itself to have authority to maintain custody of DOD detainees under the AUMF. According to DOJ officials, DOJ does not have plans to transfer any Guantánamo Bay detainees to its facilities in the United States, and such transfer is prohibited by law. BOP and Marshals Service officials also stated that, although no active consideration has been given to the unique issues that would arise in connection with transferring Guantánamo Bay detainees to the United States, on the basis of their experience they could safely and securely house and transport the detainees if requested to do so and if given the necessary resources, planning lead time, and authorities. However, several factors would need to be considered, such as maintaining separation of detainees from the current inmate population; ensuring the safety and security of facility personnel and the detainees; and

⁴¹In fiscal year 2012, BOP had a budget of about \$6.6 billion for salaries and expenses and a staff of about 36,700, which includes administrative, program, and support staff responsible for all of BOP's activities nationwide. In fiscal year 2012, the Marshals Service had a budget of \$1.2 billion and a staff of about 5,500 employees, including U.S. marshals, deputy U.S. marshals, criminal investigators, detention enforcement officers, and administrative staff.

formulating new policies and practices for housing the detainees in DOJ facilities in the United States.⁴²

DOJ Corrections Facilities in the United States

BOP has 117 corrections facilities in the United States, where as of July 2012 it held over 177,000 federal inmates.⁴³ Many of these facilities consist of both general-population and segregated housing units. BOP confines inmates at all security levels—including those inmates convicted of federal crimes related to terrorism or who otherwise have a history of or connection to terrorism.⁴⁴ BOP holds inmates in facilities that range from minimum to high security, some of which are called administrative facilities and have special purposes (e.g., the detention of pretrial offenders, or the treatment of inmates with serious or chronic medical problems).⁴⁵ Currently, BOP has only one high-security maximum-custody facility—its Administrative-Maximum (ADX) facility in Florence, Colorado—to contain the most dangerous, violent, or escape-prone inmates. BOP facility security levels are based on the extent of physical security and supervision provided in the facility. BOP reports that, in fiscal year 2011, system-wide on average, the per inmate costs to house inmates ranges from \$73.57 per day in a low-security prison to \$94.87 per day at a high-security prison. The Marshals Service is responsible for the custody of about 63,000 individuals, who are held across 22 BOP

⁴²A discussion of facilities used for classified operations and related factors that would need to be considered if the detainees were transferred to facilities in the United States can be found in the classified version of this report.

⁴³One of these facilities is located in Puerto Rico. As of July 2012, BOP also held about 40,800, or about 19 percent, of federal prisoners, in 15 privately managed low- and minimum-security level prisons, in 185 residential reentry centers (also known as halfway houses), and in home detention. According to DOJ, inmates with a history of or connection to terrorism have been referred to residential reentry centers. However, as of July 2012, BOP did not hold inmates with a history of or connection to terrorism in minimum security facilities.

⁴⁴There are a range of federal statutes that DOJ uses to prosecute terrorism-related offenses, some of which specifically address terrorist activities, such as terrorist attacks against mass transportation systems or receiving military-type training from a foreign terrorist organization, and others that address general criminal activities that could be in support of either a terrorist organization or other criminal networks, such as money laundering, immigration fraud, or drug trafficking.

⁴⁵BOP also has seven stand-alone minimum-security facilities. However, BOP does not hold individuals charged with or convicted of terrorist-related crimes or activities in minimum-security facilities.

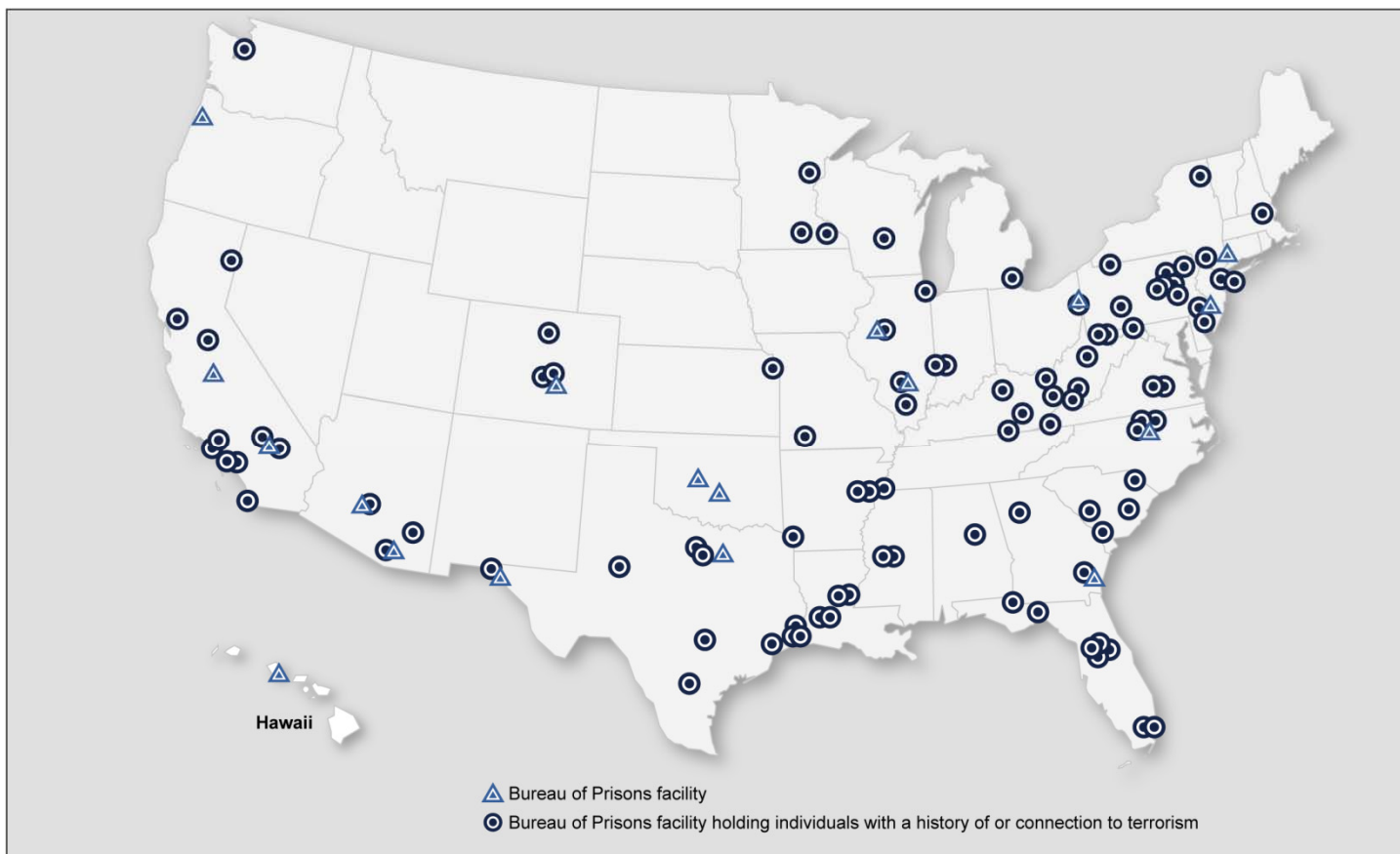
facilities, and in about 1,800 state, local, and private facilities.⁴⁶ According to Marshals Service officials, the security levels of the BOP, state, local, and private facilities it uses vary from low security to high security and administrative facilities. In addition, a facility's age, configuration, and capacity may determine the housing units the facility is able to provide. For example, some facilities provide dormitory-style housing while others may provide segregated housing units.

As of August 2012, BOP and the Marshals Service had custody of at least 377 inmates charged with or convicted of crimes related to terrorism, or who otherwise had a history of or connection to terrorism. BOP had 373 of these inmates housed in 98 of its facilities, and the Marshals Service had the remaining 4 inmates housed in 3 different facilities—2 inmates were in a BOP facility, 1 was in a privately contracted detention facility, and 1 was in a county facility.⁴⁷ See figure 8 for the locations of all BOP facilities, including the 98 facilities holding individuals with a history of or connection to terrorism; and see table 4 for the number of BOP inmates with a history of or connection to terrorism by facility security level.

⁴⁶Generally, the Marshals Service holds more than 80 percent of its inmates in state, local, and private facilities. The remaining 20 percent are held in 22 BOP facilities that have allocated bed space for the Marshals Service. Through Intergovernmental Service Agreements, the Marshals Service contracts with approximately 1,800 state and local governments for the provision of suitable quarters and the safekeeping, care, and subsistence of the prisoners in Marshals Service custody.

⁴⁷BOP identified these inmates by including offenders who have been charged with or convicted of either a terrorism offense, such as receiving terrorist training, or an offense with a documented connection to terrorism, such as using the proceeds of criminal activity to support a terrorist group. In addition, regardless of the nature of the offense, BOP included inmates who are engaged in, or are under investigation for engaging in, radicalization and recruitment activities. The Marshals Service does not classify individuals in their custody as having terrorism-related charges. Instead, they used other sources, including media reports and the nature of the pending charges, to identify individuals in their custody who might be considered to have such charges.

Figure 8: Location of BOP Facilities in the United States



Source: BOP, GAO, and Map Resources (map).

Note: This map excludes BOP minimum-security facilities.

Table 4: BOP Inmates with a History of or Connection to Terrorism by Facility Security Level as of August 2012

BOP facility security level	Number of individuals with a history of or connection to terrorism^a	Number of facilities that hold individuals with a history of or connection to terrorism
Minimum	0	0
Low	70	28
Medium	123	38
High	42	16
Administrative ^b	138	16
Total	373	98

Source: GAO analysis of BOP data.

^aBOP identified these inmates by including offenders who have been charged with or convicted of either a terrorism offense, such as receiving terrorist training, or an offense with a documented connection to terrorism, such as using the proceeds of criminal activity to support a terrorist group. In addition, regardless of the nature of the offense, BOP included inmates who are engaged in, or are under investigation for engaging in, radicalization and recruitment activities.

^bAdministrative facilities are institutions with different security levels, including maximum security. They also have special purposes, such as the detention of pretrial offenders, or the treatment of inmates with serious or chronic medical problems.

According to DOJ officials, although BOP and the Marshals Service have the correctional expertise to safely and securely house detainees with a history of or nexus to terrorism, DOJ has not made preparations for housing Guantánamo Bay detainees, nor does it have plans to do so.

DOJ Security Classification Policies

BOP has security policies that govern where inmates, including those with a history of or connection to terrorism, are sent for their terms of incarceration. While the Marshals Service does not assign specific security levels to individual inmates, Marshals Service officials told us they consider all inmates under their custody as “high-risk” for the

purposes of prisoner handling and transportation.⁴⁸ According to BOP, the first step to determine which security level is appropriate for the inmate is “scoring” the inmate. This is done by taking into consideration information about the inmate from several sources, including the sentencing court, the Marshals Service, and other federal agencies. BOP also considers other factors such as the inmate’s membership in a specific disruptive group, the inmate’s history of violence, and inmate programming. On the basis of this information, BOP assigns a score to each inmate. Generally, an inmate who receives a higher classification score will be placed in a higher-security facility. In addition to scoring, BOP also considers other factors such as the inmate’s medical needs, the level of overcrowding at a facility, and whether an inmate may need to be separated from others, before assigning the inmate to a facility.

The Marshals Service generally defers to the facility holding the inmate to conduct a risk assessment on the basis of information provided to facility officials by the Marshals Service and other law-enforcement agencies, the U.S. Attorney’s Office, and courts to determine the inmate’s appropriate custody classification level. The Marshals Service can also recommend that high-profile inmates, such as some recognized as terrorists, be held in isolation. While in Marshals Service custody, the one Guantánamo Bay detainee who was transferred to the United States in 2009 was placed in a segregated housing unit in a BOP facility in New York City. In another case, involving a terrorist suspect associated with the September 11 attacks, the Marshals Service made a special agreement with the local facility where the suspect was being held to provide increased security. For example, Marshals Service officials stated that they arranged for 24/7 monitoring of this individual, a private cell, and an additional cell for use by his legal team to conduct meetings.⁴⁹

⁴⁸According to Marshals Service officials, the Marshals Service assigns inmates under its custody to a facility on a case-by-case basis, primarily based on the facility’s proximity to where the individual is indicted, the security measures the facility can provide, the quality of facility management, the availability of in-facility medical care, and available capacity. When possible, the Marshals Service prefers to use BOP facilities because they do not charge for bed space and, because the facilities are DOJ facilities, the Marshals Service has greater control over the detention of the inmate as compared with state or local facilities.

⁴⁹According to Marshals Service officials, the Marshals Service must pay for these and other supplemental security measures such as additional car escorts and staff to and from the trial location for high-profile inmates in its custody.

DOJ may also apply additional security procedures for an individual on the basis of security concerns that are not reflected in the classification process; these exceptions are called special administrative measures. Special administrative measures, which must be authorized by the Attorney General, primarily limit an inmate's communications with other inmates and the outside world (e.g., separation from other inmates, limited telephone privileges, and visitation rights).⁵⁰ These measures may affect the BOP facility or housing unit where the inmate is placed. The Attorney General may authorize special administrative measures when there is the presence of substantial risk that an inmate's communications or contact with others could result in death or serious bodily injury to persons, or substantial damage to property. Generally, pretrial inmates subject to the provisions for special administrative measures would be held at facilities that are located within the Judicial District in which they have proceedings. Postconviction inmates subject to the provisions for special administrative measures would generally be held at ADX due to the requirements of the order that dictates specific controls on their housing and communications.

DOJ Conditions of Confinement

Conditions of confinement for inmates in BOP facilities can vary on the basis of the facility's security level, inmate behavior, and other factors. BOP policies state that all facilities, security level notwithstanding, must provide the same basic conditions of confinement, such as clean housing units; nutritionally adequate meals that meet dietary requirements (such as vegetarian or religious diet); access to educational, occupational, and leisure time programming; access to work opportunities; and basic medical and mental health care.⁵¹ All BOP facilities are to provide inmates with access to a chaplain and basic religious items according to their religious beliefs. Most inmates in general-population housing units, regardless of security level, are allowed outside of their cells approximately 16 to 17 hours per day. Generally during this time, inmates may move freely within the housing unit and may move to other areas of

⁵⁰28 C.F.R. § 501.3. Special administrative measures may be imposed for a period of up to 120 days, or, with the approval of the Attorney General, up to 1 year and may be renewed. The BOP Director may renew special restrictions within the special administrative measures if the Attorney General or a federal law-enforcement or intelligence agency provides written notification of continued substantial risk related to the inmate's communications or contacts with other persons.

⁵¹BOP detention centers and metropolitan corrections centers are not required to offer the full range of programming activities to inmates.

the facility (such as the dining or work areas) through controlled or supervised movements throughout the day. In low-security facilities, inmates live in dormitories and are not confined to a cell. Typically, general-population inmates at all security levels consume their meals in a common dining area, such as a dining hall. Inmates in general-population units also have mail, visitation, and telephone privileges that are subject to monitoring.⁵² In addition, BOP requires all its facilities to be accredited by the American Correctional Association.

BOP also operates specialized housing units that allow it to separate inmates from the general population. This specialized housing includes its ADX facility, its Communications Management Units, as well as other units.⁵³ For example, BOP's most-dangerous inmates are placed in ADX because they are perceived as a risk to the institutional security of other corrections facilities. Some of the 373 terrorism-related individuals in BOP facilities are confined in cells alone approximately 23 hours a day at ADX. According to BOP officials, as of February 2012, ADX held 41 of the 373 BOP inmates charged with or convicted of federal crimes related to terrorism. ADX has multiple housing units that provide a range of conditions of confinement on the basis of the inmate's security needs, including the following:

- *Control Unit:* The control unit is ADX's most-restrictive unit and houses BOP's most-disruptive inmates, who are allowed 7 hours of out-of-cell recreation in individual recreation areas per week. Control unit inmates are also allowed one 15-minute phone call and up to five noncontact visits per month.
- *Special Security Unit:* Generally inmates that have special administrative measures are held in the Special Security Unit. These inmates are subject to restrictive conditions specific to their special administrative measures that can include limited physical contact with other inmates; as well as limited communications, visitation, and phone calls. In addition, all inmate telephone calls and visits are contemporaneously recorded and monitored by the Federal Bureau of

⁵²According to BOP, all inmate telephone calls are recorded and randomly monitored, except for attorney-inmate telephone calls. Inmates may have limited physical contact with visitors, which may be restricted by facility staff to prevent the introduction of contraband and ensure the orderly operation of the facility.

⁵³For the purposes of this report, we limited our scope to the ADX facility and Communications Management Units.

Investigation, and written social correspondence is monitored by the Federal Bureau of Investigation as well. Special Security Unit inmates are allowed a minimum of two 15-minute phone calls and up to five visits per month.

- *General-Population and Step-Down Units:* According to BOP officials, the majority of inmates at ADX are held either in general-population units or in the step-down unit. The step-down unit is a four-phase program in which inmates may progress from more-restrictive to less-restrictive phases over a minimum of 36 months on the basis of good conduct. For example, inmates in the step-down unit may interact with other inmates during their recreation hours and receive more telephone time as they progress through the phases. Both general-population and step-down unit inmates are allowed a minimum of two 15-minute phone calls and up to five visits per month.

According to BOP officials, all inmates at ADX are generally kept segregated from each other; they consume all their meals inside their cells, except for those in phases three and four of the step-down unit, in which inmates may share their meals with a small group of other inmates. Like all BOP facilities, ADX can provide a religiously observant diet. A full-time chaplain provides for inmates' religious needs, but BOP officials explained that group prayers are not allowed at ADX. BOP provides most educational, religious, and recreational programs to ADX inmates in their cells through staff visits or by closed circuit television or radios located inside the inmates' cells. See figures 9 and 10 for examples of a segregated housing unit and recreation areas.

Figure 9: Step-Down Housing Unit, “Supermax,” U.S. Administrative Maximum Facility, Florence, Colorado



Source: BOP.

Figure 10: Outdoor Recreation Area, “Supermax,” U.S. Administrative Maximum Facility, Florence, Colorado



Source: BOP.

In addition to ADX, some individuals with a history of or connection to terrorism are held in Communications Management Units, which are administrative units located within two medium-security BOP facilities, where they are allowed to interact with the other inmates in the unit for up to 15 hours a day.⁵⁴ As of February 2012, of the 373 inmates with a history of or connection to terrorism, 44 were held in these units. In 2006 and 2008, BOP established these units to confine inmates who require increased monitoring of all communications between inmates and with persons outside the prison.⁵⁵ Communications Management Units require 100 percent live monitoring of inmates' telephone calls and social visits,

⁵⁴According to BOP policy, inmates in the Communications Management Unit at the Terre Haute Federal Correctional Institution (Terre Haute, Indiana) are ordinarily housed in double-bunk cells. Inmates in the Communications Management Unit at Marion U.S. Penitentiary (Marion, Illinois) are ordinarily housed in single-bunk cells.

⁵⁵In 2006, BOP established the Terre Haute Communications Management Unit, and in 2008, the Marion Communications Management Unit.

and review of all incoming and outgoing social mail.⁵⁶ Inmates are allowed two 15-minute telephone calls per week and 8 hours of visiting time per month, although no physical contact is allowed during visits. All telephone calls and social visits are live monitored and recorded, and they must occur in English only, unless the call is previously scheduled for and conducted through simultaneous translation monitoring. Other than increased communications monitoring, BOP officials stated that conditions of confinement in these units are the same as conditions of confinement for inmates in other medium-security general-population housing units, including access to medical and mental health services; meals meeting inmate dietary requirements served in a common dining area; access to recreation in a common area daily up to 15 hours per day; religious service opportunities; and access to leisure and law library services, table games, television in the common areas, and some aerobic exercise equipment. See figure 11 for a photographic example of a Communications Management Unit cell.

⁵⁶Legal and special mail (e.g., attorney, federal courts) can be sealed and delivered to unit management.

Figure 11: Communications Management Unit Cell, Terre Haute, Indiana



Source: BOP.

Marshals Service policy requires that the facilities it uses to detain inmates meet minimum conditions of confinement, including 24-hour staff supervision; three adequate meals per day; availability of adequate emergency medical coverage 24 hours a day; adequate security,

sanitation, and hygiene services; and access to prescription drugs. In addition, Marshals Service policy states Marshals should seek to develop intergovernmental agreements with facilities that can provide special prisoner services, such as mental health care.

Factors to Consider If the Guantánamo Bay Detainees Were to Be Held in DOJ Corrections Facilities in the United States

As previously stated, DOJ does not consider itself to have authority to maintain custody of DOD detainees under the AUMF and has no plans to house Guantánamo Bay detainees at its U.S. facilities; and BOP and the Marshals Service would need additional statutory authority to take custody of Guantánamo Bay detainees. If prohibitions against transferring the Guantánamo Bay detainees to the United States were eliminated, and BOP and the Marshals Service were authorized to conduct military detention under the AUMF in U.S. facilities, our interviews with DOJ officials and analysis of detention-operation documentation identified several factors—among others such as funding, personnel resources, and planning time—that would need to be considered. These factors include (1) formulation of policies and practices for housing the detainees; (2) ensuring the safety of facility personnel, the detainees, and the general public; (3) identifying adequate space for housing the detainees and maintaining separation of detainees from the current inmate population.

First, according to DOJ officials, new operational policies and practices would need to be formulated for housing the detainees in BOP facilities in the United States or in other types of facilities used by the Marshals Service for detention purposes. BOP and the Marshals Service established existing policies and practices pursuant to federal criminal statutes specifically authorizing them to take custody of individuals charged with or convicted of violating a federal law.⁵⁷ In addition, BOP follows American Correctional Association standards for care and treatment of inmates convicted or charged under U.S. law. According to DOJ officials, these existing policies and practices would not be sufficient if DOJ received new authority to conduct law-of-war detention. New policies and practices that would be needed include standards governing

⁵⁷ See 18 U.S.C. §§ 3142(i), 3621(a)-(b), 4001, 4042(a)(2), 4068. Pursuant to statute, DOJ also has authority to take custody of certain persons convicted by courts-martial, offenders in the District of Columbia, and state offenders pursuant to a contract for reimbursement. See 18 U.S.C. §§ 4083, 5003; Balanced Budget Act of 1997, Pub. L. No. 105-33, § 11201(a)-(b), 111 Stat. 251, 734.

(1) the holding of detainees who have not been charged with or convicted of violating U.S. law, (2) where and how each category of detainee would be housed, (3) religious and cultural accommodations, (4) visitation by the International Committee of the Red Cross, and (5) intelligence gathering and use.

Second, according to BOP and Marshals Service officials, additional procedures and infrastructure would be required governing where and how each category of detainee would be held, including their accommodations. According to Marshals Service officials, they may have to adopt additional measures to transport detainees to and from BOP facilities, which could have implications on detainee and public safety. For example, Marshals Service officials explained that when it had a high-profile prisoner associated with the September 11 attacks in its custody, it used extra security vehicles and additional staff to help ensure safety and security during transport.

Third, according to BOP officials, given its current facility capacity rates, finding capacity in its facilities for the Guantánamo Bay detainee population may present challenges. Overall, according to BOP, as of August 2012, its facilities system wide were 38 percent overcrowded, and crowding is a relatively higher concern at facilities with higher security levels, where, according to BOP officials, Guantánamo Bay detainees would likely be held. Despite current overcrowding, BOP officials said that if they had custody of the detainees, with adequate resources, they could accommodate the detainees.⁵⁸

Finally, BOP officials we interviewed said that if they were to add 166 detainees to their facilities, keeping them completely separated from the existing inmate population would have an effect on BOP's operations in the facility or facilities where the detainees were placed. For example, if BOP needed to confine detainees to single cells, existing inmates would have to be moved to create space for the detainees, which could require that BOP triple bunk some of the current inmate population. According to

⁵⁸BOP expects to activate four newly constructed prisons by 2014, adding about 5,568 beds. In addition, BOP is budgeting for additional contracted bed space—1,000 beds in 2013 and 1,500 the next year, but the addition of these contracted beds is subject to future appropriations. For additional information on BOP capacity, see: GAO, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, [GAO-12-743](#) (Washington, D.C.: Sept. 12, 2012).

BOP officials, increasing the number of inmates per cell can affect BOP's ability to ensure the safety and security of its personnel, inmates, and institutions. Another challenge BOP would face in maintaining separation of detainees and inmates would be in the provision of inmate-provided services including food preparation, commissary operations, and laundry, educational, and religious services. According to BOP officials, if detainees were to have access to these services, BOP would require additional personnel to ensure separation between the detainees and the inmates. For example, while most general-population inmates go to a shared dining hall for their meals—which can be served and prepared by other inmates—to avoid interaction with inmates, detainees would likely not be able to eat meals in shared dining halls, or in dining facilities where other inmates work.

Agency Comments and Our Evaluation

We provided a draft of this report to DOD, DOJ, and the Department of Homeland Security for comment. The Department of Homeland Security declined to provide comments, and DOD provided technical comments that were incorporated as appropriate. DOJ provided technical comments as well as a letter making additional written comments, which are reproduced in appendix IV and were incorporated as appropriate.

In its letter, DOJ stated that, generally speaking, BOP and the Marshals Service have the correctional expertise to safely and securely house detainees with a nexus to terrorism. However, DOJ reiterated that current law prohibits the transfer of detainees to the United States; DOJ has not made preparations for housing Guantánamo Bay detainees, and does not have plans to do so. DOJ also stated that, given these factors, any discussion of housing detainees in the United States is hypothetical and raises legal, policy, and resource issues that descriptions of current policies and practices contained in this report cannot fully address. We agree that given the legal restrictions on transferring detainees to the United States and DOJ's stated policy that it does not plan to transfer detainees to the United States, our assessment of factors to be considered if DOD or DOJ facilities were used to hold detainees is hypothetical. Our report provides a descriptive discussion of several factors that would need to be considered should the current legal restrictions be discontinued and detainees were transferred to the United States, but does not purport to provide a comprehensive list of all factors. Our report also clearly states the current legal restrictions and policy decisions against transferring detainees to the United States, and makes no recommendations on the legal and policy issues surrounding

Guantánamo Bay detainees and whether they should be transferred to the United States.

DOJ also recommended that we delete Table 4 showing the number of BOP inmates with a history of or connection to terrorism by facility security level. We believe the table accurately demonstrates a point DOJ makes in its comment letter; namely that BOP and the Marshals Service have the correctional expertise to safely and securely house detainees with a history of or connection to terrorism. In response to DOJ's comment, we added language clarifying that, while DOJ has this expertise, DOJ has not made preparations or plans to house Guantánamo detainees.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. We will send copies to appropriate congressional committees, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact Brian J. Lepore at (202) 512-4523 or LeporeB@gao.gov, or David C. Maurer at (202) 512-9627 or MaurerD@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brian Lepore". The signature is fluid and cursive, with the first name "Brian" and last name "Lepore" clearly distinguishable.

Brian J. Lepore
Director
Defense Capabilities and Management Team

A handwritten signature in black ink, appearing to read "David C. Maurer". The signature is fluid and cursive, with the first name "David" and last name "Maurer" clearly distinguishable.

David C. Maurer
Director
Homeland Security and Justice Team

Appendix I: Scope and Methodology

The scope of our work was to provide a descriptive review of the detention facilities and infrastructure at Guantánamo Bay, existing military and civilian corrections facilities in the United States, and an overview of factors that might need to be considered if Guantánamo Bay detainees were moved to facilities in the United States. Hence, our review did not include an evaluation of whether specific U.S. facilities would be suitable for holding Guantánamo Bay detainees. Our description of what factors would need to be considered does not include legal issues related to the Guantánamo Bay detainees that are currently being adjudicated, such as habeas corpus, and right to counsel. We limited our review to corrections facilities in the United States operated by the Department of Defense (DOD) and the Bureau of Prisons (BOP) and federal, state, local, and private facilities used by the U.S. Marshals Service (Marshals Service). Additionally, we interviewed officials from the Department of Homeland Security who told us that its detention facilities are used to detain foreign nationals who are awaiting deportation from the United States, not detainees brought to the United States for law-of-war detention, pretrial detention, or postconviction incarceration. Thus we subsequently removed the Department of Homeland Security from the scope of our work.

To describe the history and current status of Guantánamo Bay detention operations, facilities, and infrastructure, we reviewed relevant international law and U.S. laws and policies relating to DOD's detention operations, including Common Article 3 of the Geneva Conventions of 1949 and relevant sections of Title 10 of the U.S. Code. We also reviewed executive orders pertaining to Guantánamo Bay detention operations, an interagency report on detainees' status, and DOD reports on conditions of detention at Guantánamo Bay. We conducted a site visit to the detention and support facilities at the U.S. Naval Station Guantánamo Bay, where we interviewed officials and observed operations at Camps 5, 6, Echo, and Iguana, and toured former camps. Members of the team also received a detailed briefing on Camp 7 and reviewed photographs of the facility. We met with officials and toured the detention-support facilities including the courtroom complex, media-support facility, detainee hospital, behavioral health center, kitchen facility, intelligence operations-support facilities, information-technology facilities, visitor lodging, and staff housing. We also met with officials responsible for providing legal and International Committee of the Red Cross support. In addition, we interviewed officials from the Office of the Secretary of Defense, Joint Staff, U.S. Southern Command, Joint Task Force-Guantánamo, Congressional Research Service, and American Correctional Association. In order to determine the average cost to operate Guantánamo Bay detention facilities and support operations, we

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obtained data from U.S. Southern Command on funding that the U.S. Army and U.S. Southern Command provide for detention operations at Guantánamo Bay. We met with officials to clarify funding sources and totals, as well as the cost categories not included in these data, and analyzed the data to determine average funding among fiscal years 2008 through 2012. We conducted a data-reliability analysis of these data by asking detailed questions of U.S. Southern Command regarding the origins and means of collection of these data, and determined that the data were sufficiently reliable for our purposes.

To describe DOD corrections facilities in the United States and factors to consider in the event that they were to hold Guantánamo Bay detainees, we focused the scope of our review on DOD's Level II and Level III facilities. DOD has two Level II regional corrections facilities and three Level II consolidated brigades used for pretrial confinement and for inmates with sentences ranging from 1 to 5 years, and one Level III facility used for inmates with sentences from 5 years to life, and inmates sentenced to death. We excluded DOD's Level I facilities, because they are not intended for confinement of individuals for more than 1 year. We reviewed relevant laws such as the Detainee Treatment Act, the Military Commissions Act, and the Uniform Code of Military Justice; and DOD documents that govern its corrections operations and facilities, such as DOD directives on the administration of military corrections facilities and Army and Navy corrections manuals and regulations. In order to determine overall capacity levels in DOD Level II and Level III corrections facilities, we obtained and analyzed facility capacity data from the Army and the Navy. We conducted a data-reliability analysis of these data by obtaining information from DOD officials on how the data are collected and used, and what internal controls the data are subject to. We determined that they were sufficiently reliable for our purposes. In addition, we conducted site visits to the Naval Consolidated Brig Chesapeake, Virginia (Level II); the Midwest Joint Regional Correctional Facility, Ft. Leavenworth, Kansas (Level II); and the United States Disciplinary Barracks, Ft. Leavenworth, Kansas (Level III). We interviewed officials and observed operations at these facilities. We selected these facilities because they represent both Level II and Level III facility operations; both Army and Navy operating procedures; and because they reflect a range of housing configurations—including both segregated and general-population housing units. In addition, we interviewed officials responsible for the management of DOD corrections facilities, including officials from the Office of the Secretary of Defense, Joint Staff, Army Corrections Command, and Bureau of Naval Personnel.

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To identify factors for consideration if the Guantánamo Bay detainees were transferred to DOD facilities in the United States, we reviewed analyses from 2009 conducted by DOD to determine whether its facilities were equipped to conduct Guantánamo Bay detainee operations. We also interviewed an official that worked on these analyses to identify what factors and facilities may have changed since 2009. Because these analyses were based on the assumption that all detention operations—including intelligence operations and military commission support—would remain the same, we maintained this assumption in our description of factors requiring consideration in the event that Guantánamo Bay detainees were moved to DOD facilities in the United States. Therefore, using this assumption as our framework, we identified challenges DOD might face in conforming to all relevant U.S. laws and policies, international laws, as well as DOD corrections policies and operating procedures if Guantánamo Bay detainees were transferred to DOD facilities. We also identified operational challenges that DOD might face in moving its detention operations as they currently exist to the United States. Factors we describe in this section provide a summary of several key issues DOD may need to consider, and is not intended to be an all-inclusive list. Additionally, we are issuing a classified version of this report. That version includes an additional appendix that provides a discussion of Guantánamo Bay facilities used for classified operations that would need to be considered if the detainees were transferred to facilities in the United States.

To describe Department of Justice (DOJ) corrections facilities in the United States we reviewed relevant laws and policies, such as federal laws and regulations governing detention pending trial in federal court, imprisonment of federal offenders, and BOP management and operations; BOP and Marshals Service policies, such as the BOP policies on inmate classification and management and a Marshals Service directive on prisoner detention and housing. We also interviewed officials from BOP, the Marshals Service, and the Office of the Deputy Attorney General. We conducted site visits to and interviewed officials at four BOP facilities including: U.S. Penitentiary, Leavenworth, Kansas; U.S. Penitentiary, Lewisburg, Pennsylvania; Federal Correctional Complex, Florence, Colorado; and Federal Correctional Complex, Allenwood, Pennsylvania. We selected these facilities because they provide examples of various types of housing units and security levels, including segregated and general-population housing units. In order to determine overall capacity levels in DOJ facilities, we obtained and analyzed facility capacity data from BOP and the Marshals Service. To assess the reliability of the BOP and Marshals Service data on facility capacity, we

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reviewed agency documentation, received a demonstration of BOP's facility database, and interviewed BOP and Marshals Service officials. We determined that the data were sufficiently reliable for our purposes.

To describe the number and locations of inmates in BOP and Marshals Service custody charged with or convicted of terrorism-related crimes, we obtained inmate data from both agencies. Both BOP and the Marshals Service determined the criteria for inmates identified as charged with or convicted of terrorism-related crimes. BOP identified these inmates by including offenders who have been charged with or convicted of either a terrorism offense, such as receiving terrorist training, or an offense with a documented connection to terrorism, such as using the proceeds of criminal activity to support a terrorist group. In addition, regardless of the nature of the offense, BOP included inmates who are engaged in, or are under investigation for engaging in, radicalization and recruitment activities. BOP described the group of inmates for which they provided data as inmates with a history of or nexus (connection) to terrorism. While the Marshals Service does not classify individuals in its custody as having terrorism-related charges, it used other sources, including media reports and the nature of the pending charges, to identify individuals in its custody who might be considered to have such charges. To describe factors that would need to be considered if Guantánamo Bay detainees were transferred to DOJ facilities in the United States, we assumed that operations or conditions of confinement at facilities used by BOP or the Marshals Service may be the same as those as currently at Guantánamo Bay. While it is likely that conditions of confinement and related procedures for the detainees would change if they were moved into DOJ facilities, it is unclear what changes would occur. Thus, for the purposes of this report, when discussing factors for consideration if the detainees were moved to DOJ facilities, we assumed that most conditions and procedures would remain the same. Therefore, using this assumption as our framework, we identified challenges DOJ might face in conforming to relevant U.S. laws and policies, as well as DOJ corrections policies and operating procedures if Guantánamo Bay detainees were transferred to DOJ facilities. We also identified operational challenges that DOJ might face in providing the same scope and level of detention operations at its facilities in the United States as DOD provides at Guantánamo Bay. Factors we describe in this section provide a summary of several key issues DOJ may need to consider, and is not intended to be an all-inclusive list.

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We conducted this performance audit from January 2012 to November 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

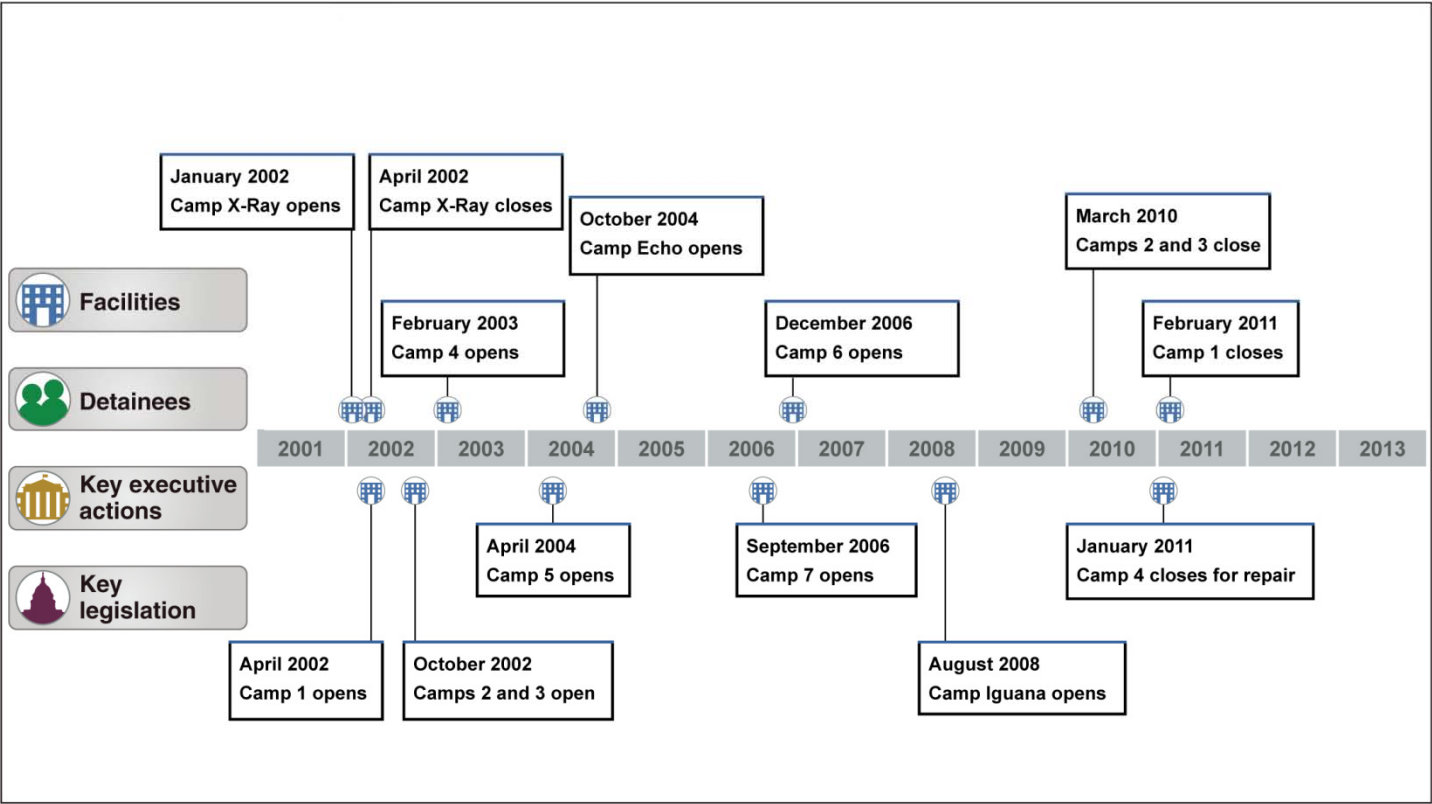
Appendix II: Summary of Key Legislation Affecting the Potential to Transfer Guantánamo Bay Detainees to the United States

In addition to legal issues pertaining to the authority of civilian agencies to conduct military detention operations, since Executive Order 13492 was signed in January 2009, a number of statutes have limited or prohibited the transfer of Guantánamo Bay detainees to U.S. facilities.

Legislation	Date enacted	Effect on transfer of detainees
<i>Supplemental Appropriations Act, 2009</i> Pub. L. No. 111-32 (2009)	June 24, 2009	Prohibits the use of federal funds to transfer Guantánamo Bay detainees into the United States, except for prosecution or detention during legal proceedings, and requires the President to report this transfer to Congress 45 days in advance and provide detailed plans regarding potential risks and mitigation strategies.
<i>National Defense Authorization Act for Fiscal Year 2010</i> Pub. L. No. 111-84 (2009)	October 28, 2009	During the specified period, prohibits the use of funds made available to Department of Defense (DOD) to release detainees into the United States, and limits the authority of DOD to transfer detainees to the United States until after the President submits a comprehensive plan including, for example, potential risks, costs, and mitigation strategies for each detainee to be transferred.
<i>Consolidated Appropriations Act, 2010</i> Pub. L. No. 111-117(2009)	December 16, 2009	Prohibits the use of federal funds to transfer Guantánamo Bay detainees into the United States, except for prosecution or detention during legal proceedings, and requires the President to report this transfer to Congress 45 days in advance and provide detailed plans regarding potential risks and mitigation strategies.
<i>Ike Skelton National Defense Authorization Act for Fiscal Year 2011</i> Pub. L. No. 111-383 (2011)	January 7, 2011	Prohibits the use of funds authorized for fiscal year 2011 to transfer Guantánamo Bay detainees to the United States. Prohibits the use of funds to construct or modify facilities in the United States for the purpose of detaining or imprisoning detainees under DOD control.
<i>Department of Defense and Full-Year Continuing Appropriations Act, 2011</i> Pub. L. No. 112-10 (2011)	April 15, 2011	Prohibits the use of federal funds to transfer or assist in the transfer of Guantánamo Bay detainees into the United States, unless the detainee is a U.S. citizen or a member of the U.S. Armed Forces.
<i>Consolidated and Further Continuing Appropriations Act, 2012 and Consolidated Appropriations Act, 2012</i> Pub. L. No. 112-55 (2011) and Pub. L. No. 112-74 (2011).	November 18, 2011 and December 23, 2011	Both laws prohibit the use of federal funds to transfer or assist in the transfer of Guantánamo Bay detainees into the United States, unless the detainee is a U.S. citizen or a member of the U.S. Armed Forces.
<i>National Defense Authorization Act for Fiscal Year 2012</i> Pub. L. No. 112-81(2011)	December 31, 2011	Prohibits the use of funds authorized for fiscal year 2012 to transfer Guantánamo Bay detainees to the United States. Prohibits the use of funds to construct or modify facilities in the United States for the purpose of detaining or imprisoning detainees under DOD control.

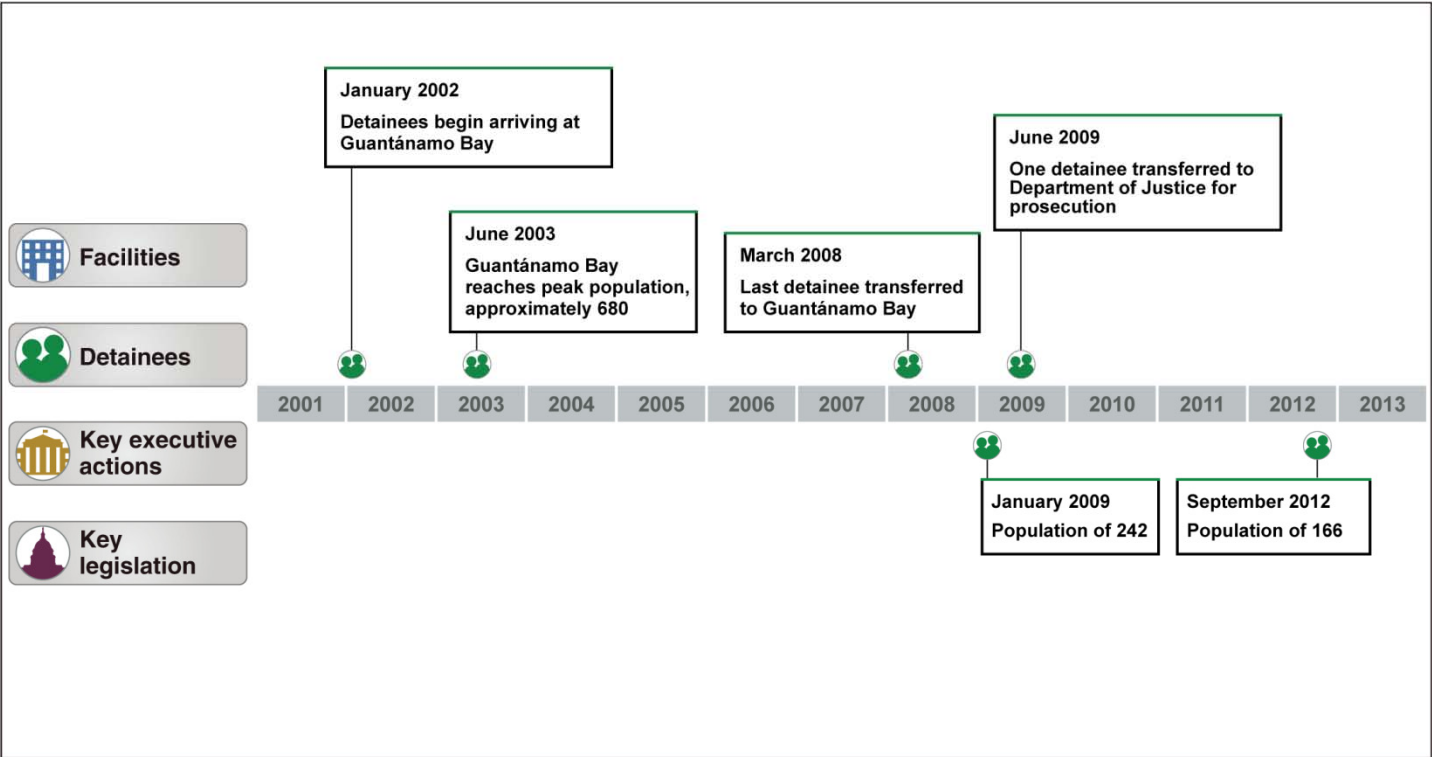
Source: GAO analysis of relevant laws.

Appendix III: Noninteractive Timeline of Guantánamo Bay Detention Operations



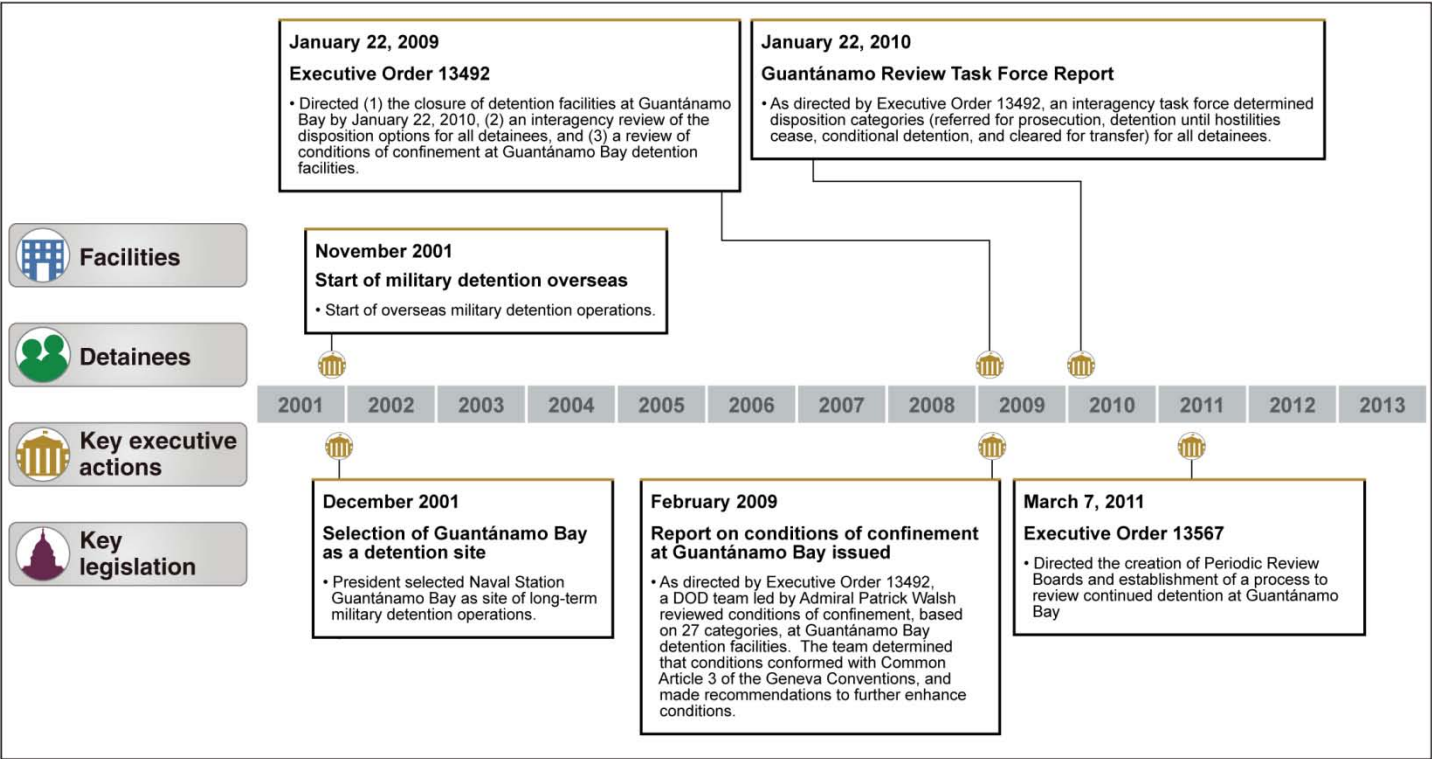
Source: DOD, DOJ, and GAO analysis of select executive and legislative actions.

Appendix III: Noninteractive Timeline of
Guantánamo Bay Detention Operations



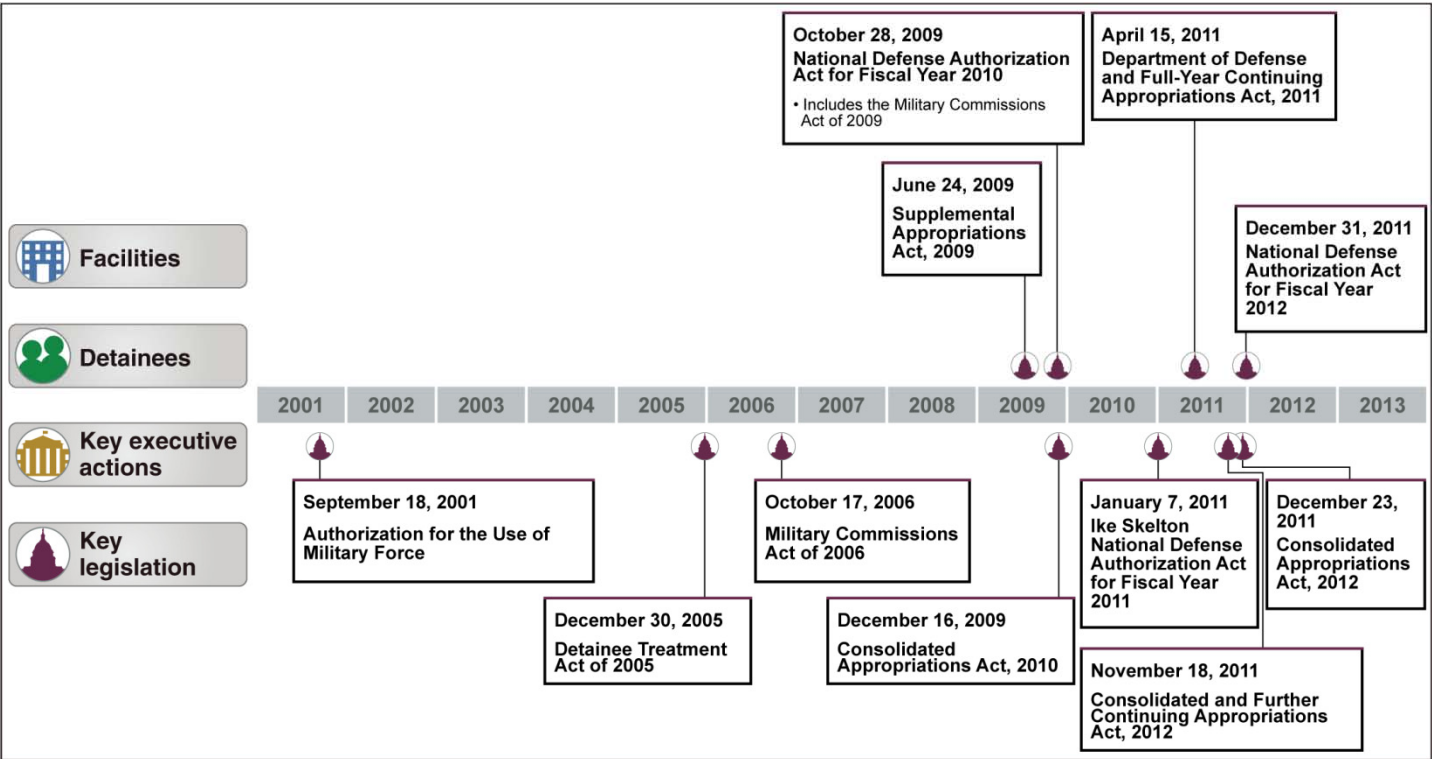
Source: DOD, DOJ, and GAO analysis of select executive and legislative actions.

Appendix III: Noninteractive Timeline of
Guantánamo Bay Detention Operations



Source: DOD, DOJ, and GAO analysis of select executive and legislative actions.

Appendix III: Noninteractive Timeline of
Guantánamo Bay Detention Operations



Source: DOD, DOJ, and GAO analysis of select executive and legislative actions.

Appendix IV: Comments from the Department of Justice

Note: Page numbers in the draft may differ from those in this report.



U.S. Department of Justice

NOV - 6 2012

Washington, D.C. 20530

David C. Maurer
Director
Homeland Security and Justice Team
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Maurer:

Thank you for the opportunity to comment on the Government Accountability Office's draft Report to the Chair of the Senate Select Committee on Intelligence, Guantanamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States. On January 12, 2012, the GAO first informed the Department of Justice of the engagement, which GAO initiated after receiving a request from Senator Feinstein. In providing comments on the draft report, the Department made clear that it has no plans to house any Guantanamo detainees in U.S. facilities.

As the draft report indicates, following standard procedures, GAO teams requested to speak to various Department offices, along with other agencies, to obtain technical assistance and information relevant to GAO's report. The Department provided such assistance, which has consisted of describing existing practice regarding the housing of criminal detainees, resource issues, and a description of certain legal authorities relevant to the report. The Department was not asked to provide, and did not provide, its views on policy issues that would arise if serious consideration were given to transferring Guantanamo detainees to the United States – issues that the report does not address.

The Department appreciates GAO's effort to incorporate into the report many of the detailed comments the Department provided on September 19, 2012, and the separate technical comments that have been provided by the Bureau of Prisons and United States Marshals Service. To the extent that GAO declined to incorporate some of the comments contained in the September 19 letter, the Department respectfully incorporates them here. Specifically, the Department continues to recommend the deletion of Table 4 on page 34 of the draft report, regarding the types of facilities used to house inmates with a nexus to terrorism, because the information is open to significant misinterpretation and its relevance to the detainees at issue in this report is unclear. Also, on page 31 we recommend changing the third sentence to reflect accurately the Department's position, as follows: "According to DOJ officials, DOJ does not have plans to transfer any Guantanamo Bay detainees to its facilities in the United States, and such transfer is prohibited by law."

**Appendix IV: Comments from the Department
of Justice**

David C. Maurer

Page 2

In addition, the Department reiterates the broader points made in the September 19 comments. As the draft report states, current law prohibits the transfer of Guantanamo detainees to the United States. Importantly, because current law bars the transfer of the detainees to the United States, and such transfers are not being considered, the Department's comments in response to GAO's hypothetical questions about housing such detainees in the United States did not address all of the issues that the Department would likely identify if such transfers were seriously considered. Accordingly, although the Bureau of Prisons and United States Marshals Service assisted GAO in obtaining an accurate account of current policies relating to U.S. facilities, procedures, and the prison population, any decision by Congress and the Executive Branch to transfer Guantanamo detainees to the United States would raise legal, policy, and resource issues that descriptions of current policies and practices cannot fully address. Any information provided by the Department bearing on how such a decision would implicate Department resources or authorities is necessarily tentative because the Department has not had occasion to evaluate those issues in detail.

The only conclusion supportable by the information provided by the Department is that, generally speaking, the Bureau of Prisons and Marshals Service have the correctional expertise to safely and securely house detainees with a nexus to terrorism. However, the Department has not made preparations for housing Guantanamo detainees, does not have plans for doing so, has not recently explored the issues that would need to be considered, and would require adequate lead time and considerable resources to house Guantanamo detainees.

Sincerely,



Lee J. Lofthus
Assistant Attorney General
for Administration

Appendix V: GAO Contacts and Staff Acknowledgments

GAO Contacts

Brian J. Lepore, (202) 512-4523 or LeporeB@gao.gov

David C. Maurer, (202) 512-9627 or MaurerD@gao.gov

Staff Acknowledgments

In addition to the contacts named above, Alissa Czyz (Assistant Director), Edward J. George, Jr. (Assistant Director), Carla Brown, Jennifer Bryant, Frances Cook, Michele Fejfar, Gregory Marchand, Tida Reveley, Kelly Rubin, Jennifer Spence, Amie Steele, Cheryl Weissman, and Yee Wong made significant contributions to this report.

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Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548

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Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548



Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit D

Current Guantanamo Bay Detainee-Petitioners Approved For Transfer (Sept. 21, 2012)*

ISN	Detainee's Name	Civil Action Number
34	Al Khadr Abdallah Muhammad Al-Yafi	05-CV-2386
35	Idris Ahmad Abdu Qadir Idris	09-CV-0745
36	Ibrahim Othman Ibrahim Idris	05-CV-1555
38	Ridah Bin Saleh Al-Yazidi	07-CV-2337
152	Asim Thabit Abdullah Al-Khalaqi	05-CV-0999
153	Fayiz Ahmad Yahia Suleiman	10-CV-1411
163	Khalid Abd Elgabar Mohammed Othman	05-CV-2088
168	Adel Al-Hakeemy	05-CV-0429
170	Sharif Al-Sanani	05-CV-2386
174	Hisham Sliti	05-CV-0429
189	Falen Gharebi	04-CV-1164
197	Younous Chekkouri	05-CV-0329
200	Saad Al-Qahtani	05-CV-2384
224	Mahmoud Al-Shubati	07-CV-2338
238	Nabil Said Hadjarab	05-CV-1504
239	Shaker Aamer	04-CV-2215
249	Mohammed Abdullah Mohammed Ba Odah	06-CV-1668
254	Muhammed Ali Husayn Khunaina	05-CV-2223
255	Said Muhammad Salih Hatim	05-CV-1429
257	Omar Hamzayavich Abdulayev	05-CV-2386
259	Fadhel Hussein Saleh Hentif	06-CV-1766
275	Abdul Sabour	05-CV-1509
280	Khalid Ali	05-CV-1509
282	Sabir Osman	05-CV-1509
288	Motai Saib	05-CV-1353
290	Ahmed Bin Saleh Bel Bacha	05-CV-2349
309	Muieen Adeem Al-Sattar	08-CV-1236
326	Ahmed Adnan Ahjam	09-CV-0745
327	Ali Al Shaaban	05-CV-0892
329	Abdul Hadi Omar Mahmoud Faraj	05-CV-1490
502	Abdul Bin Mohammed Ourgy	05-CV-1497
511	Suleiman Awadh Bin Aqil Al-Nahdi	05-CV-0280
553	Abdulkhalik Ahmed Al-Baidhani	04-CV-1194
554	Fahmi Salem Al-Assani	05-CV-0280
564	Jalal Bin Amer Awad	04-CV-1194
566	Mansour Mohamed Mutaya Ali	08-CV-1233
570	Sabry Mohammed	05-CV-2385
572	Saleh Mohammad Seleh Al-Thabbi	05-CV-2104
574	Hamood Abdullah Hamood	06-CV-1767
575	Saad Nasir Mukbl Al-Azani	08-CV-2019
680	Emad Abdallah Hassan	04-CV-1194
684	Mohammed Abdullah Taha Mattan	09-CV-0745

*The chart does not include any current Guantanamo Bay detainees approved for transfer whose transfer status is protected by sealed orders issued by the Court of Appeals.

Current Guantanamo Bay Detainee-Petitioners Approved For Transfer (Sept. 21, 2012)*

ISN	Detainee's Name	Civil Action Number
686	Abdel Ghaib Ahmad Hakim	05-CV-2199
689	Mohammed Ahmed Salam Al-Khateeb	09-CV-0745
690	Abdul Qader Ahmed Hussein	05-CV-2104
691	Mohammed Al-Zarnouqi	06-CV-1767
722	Jihad Dhiab	05-CV-1457
757	Ahmed Abdel Aziz	05-CV-0492
894	Mohammed Abdul Rahman	05-CV-0359
899	Shawali Khan	08-CV-1101
928	Khiali Gul	05-CV-0877
934	Abdul Ghani	09-CV-0904
1015	Hussain Salem Mohammad Almerfedi	05-CV-1645
1103	Mohammad Zahir	05-CV-2367
10001	Belkacem Bensayah	04-CV-1166

*The chart does not include any current Guantanamo Bay detainees approved for transfer whose transfer status is protected by sealed orders issued by the Court of Appeals.

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit E



Posted on Fri, Sep. 21, 2012

U.S. names 55 Guantánamo captives cleared for release

By CAROL ROSENBERG

crosenberg@miamiherald.com



WALTER MICHOT / MIAMI HERALD STAFF

Cooperative captives in communal detention conduct prayers during Ramadan at the U.S. Navy base at Guantánamo Bay, Cuba on Monday Aug. 6, 2012. This photo was taken through one-way glass, without the detainees' knowledge, from a vantage point that looks down on the cellblock. It was then reviewed by a member of the U.S. military at Guantánamo, and approved for release.

The Obama administration on Friday named 55 captives who the government has cleared for release from the prison camps in Guantánamo if they can be repatriated or resettled safely through diplomatic deals. The government has for years refused to make the names public.

The list includes Syrians and Yemenis whose countries are so rocked by unrest that the U.S. government has frozen all repatriations. It also includes three Muslims from China's Uighur population, who won a federal court release order in 2008 but spurned an offer to leave Guantánamo for the Pacific island nation of Palau.

Also on the list: A Tajik cleared long ago by the Bush administration who fears repatriation; a Saudi national whose family lives in Britain, and several Tunisian men who before the Arab Spring feared persecution if returned to the dictatorship in their homeland.

The Defense Department holds 167 foreign men as prisoners at Guantánamo — just

four as convicted war criminals and six currently facing capital charges. The rest are held in a variety of statuses assigned them by a Task Force representing the U.S. intelligence, law enforcement and prosecution communities.

A State Department statement said the Obama government had been withholding the names of Guantánamo captives cleared for release from the public “to maintain flexibility in its diplomatic engagements with foreign governments on potential detainee transfers, especially in cases of resettlement in third countries.”

Now, the statement said, there are very few cleared Guantánamo captives who should be sent to a third country “due to humane treatment concerns.”

The list of the names of the 55 men was attached to filings at the U.S. District court in Washington, D.C., where different captives are in different stages of suing for their freedom. The name of a 56th man designated for transfer was withheld because his name is under seal by the U.S. Court of Appeals, the State Department said.

Making the names public also lifts restrictions on defense lawyers, who are now free to seek third-country deals on their own.

Obama-era resettlements have been the responsibility of U.S. Ambassador Dan Fried, a State Department veteran who since 2009 negotiated deals to resettle Guantánamo captives in such far-flung locations as Bermuda, Cape Verde, El Salvador and across Europe.

“This is a partial victory for transparency,” said attorney Zachary Katznelson of the American Civil Liberties Union, which has sought the status of each captive under the Freedom of Information Act.

Suzanne Nossel, director of Amnesty International’s United States chapter, issued a statement urging the immediate release of the men.

“Indefinite detention is a human rights violation,” she said.

She also highlighted the case of detainee Shaker Aamer, a 45-year-old former British resident who was turned over to U.S. forces in Afghanistan after the Sept. 11, 2001 attacks — and urged his return to his wife and children in London. As a Saudi citizen, the United States could repatriate him to either the UK or the nation of his birth.

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit F

December 31, 2012

BY CERTIFIED MAIL

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

RE: FREEDOM OF INFORMATION ACT REQUEST

To Whom It May Concern,

This letter is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (as amended by the OPEN Government Act of 2007, Pub. L. No. 110- 175, 121 Stat. 2524), implemented by the Department of the Defense ("DoD") under the policies and regulations set forth in 32 C.F.R. Chapter I, Subchapter N, Part 286, for disclosure of the names of the 46 Guantanamo captives whose status has been designated by an Obama administration Task Force as "Continued Detention under the [Authorization for Use of Military Force]" ("AUMF detainees").

On January 22, 2009, President Obama issued Executive Order 13492, calling for an interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there.¹ A year later, on January 22, 2010, the Guantanamo Review Task Force published the review entitled "Final Report."² In that report, the Task Force acknowledged that 48 Guantanamo detainees were approved for continued detention under the AUMF.³ A report issued in November 2012 by the United States Government Accountability Office ("GAO report") entitled "Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States," reveals that the population of detainees under the status "Continued Detention under the AUMF" has shrunk to 46 individuals.⁴

I believe that the names of these individuals are not classified. The names of 55 detainees mentioned alongside the 46 AUMF detainees in the GAO report were made public in a court filing that appeared in a case in the U.S. Federal District Court for the District of Columbia, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).⁵ I therefore write to request access to

¹ Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

² GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (Jan. 22, 2010).

³ *Id.* at 10.

⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES 9 (2012), *available at* <http://www.gao.gov/assets/660/650032.pdf>.

⁵ Current Guantanamo Bay Detainee-Petitioners Approved for Transfer (Sept. 21, 2012), *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166 (Doc. No. 314-2)), *available at* <http://media.miamiherald.com/smedia/2012/09/21/17/22/1dquzf.S0.56.pdf>.

or copies of the following records⁶:

1. Records sufficient to disclose the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as "Continued Detention under the AUMF" in the November 2012 GAO report.

It is my belief that Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy William K. Lietzau's office serves as the repository of the records related to the identities of the Guantanamo detainees. This belief is supported by the description of the Deputy Assistant's responsibilities provided by the DoD which states that "he is responsible for developing and coordinating global policy guidance regarding Rule of Law initiatives and the detention of captured enemy forces."⁷ It is consequently my belief that my request for the names of the 46 AUMF detainees is properly directed to the Office of the Secretary of Defense FOIA Requester Service Center.

REQUEST FOR A PUBLIC INTEREST FEE WAIVER

A waiver of search and review fees under U.S.C. § 552(a)(4)(A)(ii)(II) is appropriate here because I am a reporter for the Miami Herald. As such, I "actively gather[] news for an entity that is organized and operated to publish or broadcast . . . information that is about current events or that would be of current interest to the public." 32 C.F.R. §286.28(e)(7)(i). It is therefore appropriate to waive fees for this request.

Additionally, any duplication fees should be waived because the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii). A fee waiver is properly granted when disclosure "is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester." 32 C.F.R. § 286.28(d)(1). This request clearly satisfies these criteria.

First, the continued holding of detainees at the Guantanamo Bay Naval Base concerns "the operations or activities of the DoD," as the U.S. Navy, U.S. Marine Corps, U.S. Army, and U.S. Coast Guard are uniformed services of the United States Armed Forces as defined by 10 U.S.C. § 101(a)(4).

Second, the requested material will "significantly contribute to the public's understanding of the operations or activities of the DoD" at Guantanamo Bay. 32 C.F.R. § 286.28(d)(1). The DoD's stated mission is to "provide military forces needed to deter war and to protect the security of our country."⁸ It is self-evident that the information requested will contribute to the general public's understanding of how the DoD handles detainees held at military bases, an

⁶ Records include but are not limited to electronic records, letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, or any other materials.

⁷ U.S. DEPARTMENT OF DEFENSE, *William K. Lietzau: Deputy Assistant Secretary of Defense (Rule of Law and Policy)*, <http://www.defense.gov/bios/biographydetail.aspx?biographyid=246> (last visited Dec. 11, 2012).

⁸ U.S. DEPARTMENT OF DEFENSE, *About the Department of Defense (DOD)*, <http://www.defense.gov/bios/biographydetail.aspx?biographyid=246> (last visited Dec. 11, 2012).

activity that's indistinguishable from protecting the security of our country. Additionally, because this information is not already in the public domain, its release is likely to add "meaningful new information concerning the operations and activities" of the government to the public domain. 32 C.F.R. § 286.28(d)(3)(i)(B).

Finally, given the nature of the great public interest in the Guantanamo Bay Naval Base in general, the disclosure of an important part of its history "will inform, or have the potential to inform, the public rather than simply the individual requester or small segment of interested persons." 32 C.F.R. § 286.28(d)(3)(i)(C). As a reporter with substantial experience writing on this topic for national audience, I have "the capability and intention to disseminate" the names of the 46 AUMF detainees. 32 C.F.R. § 286.28(d)(3)(i)(C). I have written extensively about the Guantanamo detainee situation and recently published an article in the *Miami Herald* on the identities of other previously unnamed Guantanamo detainees.⁹ Furthermore, since the history of this particular facility is a "current subject of wide public interest," and this information is not already known to the general public, disclosure will "be unique in contributing previously unknown facts, thereby enhancing public knowledge." 32 C.F.R. § 286.28(d)(3)(i)(D).

Therefore, I respectfully request that all fees related to the search, review, and duplication of the requested records be waived. However, in the event that duplication fees are not waived, I am willing to review the requested records on site. If the search and review fees will not be waived, I ask that you contact me at the email address below if the estimated fees resulting from this request exceed \$100.

REQUEST FOR EXPEDITED PROCESSING

Further, I ask that the information I am requesting be disclosed on an expedited basis. This request involves information "urgently needed by an individual engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity" and should therefore be granted expedited processing. 28 C.F.R. § 286.4(d)(3)(ii).

As noted above, I am a reporter for the Miami Herald "whose primary activity involves publishing or otherwise disseminating information to the public." 28 C.F.R. § 286.4(d)(3)(ii). The information requested is time sensitive because it involves "a breaking news story of general public interest." 28 C.F.R. § 286.4(d)(3)(ii)(A). Although the United States has operated military detention facilities at the Navy base at Guantanamo Bay since 2002, the government only recently acknowledged which detainees the Obama Task Force cleared for release.¹⁰ This breaking story has generated wide public interest.¹¹ I will produce a report for the Miami Herald that will be available in print and on the internet as soon as I receive the requested information

⁹ See Carol Rosenberg, *U.S. Names 55 Guantánamo Captives Cleared for Release*, MIAMI HERALD, Sept. 21, 2012, <http://www.miamiherald.com/2012/09/21/3014519/us-names-55-guantanamo-captives.html>.

¹⁰ *Id.*

¹¹ See, e.g., Evan Perez, *White House Releases Names of 55 Guantanamo Detainees*, WALL ST. J., Sept. 21, 2012, <http://blogs.wsj.com/law/2012/09/21/white-house-releases-names-of-55-guantanamo-detainees/>; Carol J. Williams, *Names of Guantanamo Detainees Set for Transfer Are Revealed*, L.A. TIMES, Sept. 21, 2012, <http://articles.latimes.com/2012/sep/21/nation/la-na-nn-gitmo-detainees-named-20120921>; Danica Coto, *US Releases Names of 55 Guantanamo Detainees*, YAHOO! NEWS (Sept. 21, 2012), <http://news.yahoo.com/us-releases-names-55-guantanamo-detainees-213757858.html>.

and so it is important that I receive this information on an expedited basis.

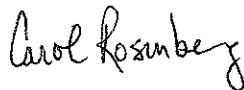
Moreover, the timing of the report will allow the public to engage with representatives of the newly-elected government, in a position to make policy decisions regarding matters to be addressed in the report. In order to inform the public in this critical timeframe, it is essential that I am able to quickly begin working with the disclosed information. A failure to receive the disclosed information in an expedited manner would seriously harm my ability to inform the public about these aspects of government activities. This would, in turn, seriously and irreparably harm the public's ability to engage with public officials on these matters at this critical time. I therefore ask that you grant this Request on an expedited basis.

In compliance with 32 C.F.R. § 286.4 (d)(3)(iii), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of the my knowledge and belief.

If this FOIA request is denied in whole or in part, please justify all denials by reference to the specific exemptions of the Act, pursuant to 32 C.F.R. § 286.23(e)(3). In addition, please release all segregable portions of otherwise exempt material in accordance with 32 C.F.R. § 286.23(d). If any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so I may begin the process of requesting a Mandatory Declassification Review ("MDR") under the terms of EO 13526.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at the below email address. Pursuant to the DoD's expedited processing regulations, I expect to receive notice of whether my request for expedited processing has been granted within 10 calendar days. 32 C.F.R. § 286.28(d)(3).

Sincerely,



Carol Rosenberg
The Miami Herald
One Herald Plaza
Miami FL 33132-1693
305.376.3179 (work)
305.742.8590 (cell)
011.5399.75007 Gitmo
crosenberg@miamiherald.com
www.twitter.com/carolrosenberg
www.miamiherald.com/guantanamo

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit G



Rosenberg, Carol <crosenberg@miamiherald.com>

FOIA Request 13-F-0242

Bowers, Michael D CIV WHS-ESD-FOID <michael.bowers@whs.mil>

Mon, Jan 7, 2013 at 7:27 AM

To: "crosenberg@miamiherald.com" <crosenberg@miamiherald.com>

Cc: "Council, Suzanne CIV WHS-ESD" <Suzanne.Council@whs.mil>

Ms. Carol Rosenberg
Miami Herald
One Herald Plaza
Miami, FL 33132-1693

Dear Ms. Rosenberg:

This letter acknowledges the receipt of your December 31, 2012, Freedom of Information Act (FOIA) request for records disclosing the names of the 46 "Authorization for Use of Military Force" (AUMF) Guantanamo Bay detainees. We received your request on December 31, 2012 and noted your request for expedited treatment.

Regarding your request for expedited processing, you are asking this Office to place your request ahead of all other requests received. This Office, however, receives hundreds of FOIA requests. According to DoD Regulation 5400.7-R, in order to qualify for expedited processing, a requester must demonstrate a "compelling need" for the information, i.e., that failure to obtain the records on an expedited basis reasonably could be expected to pose an imminent threat to the life or physical safety of an individual, or an imminent loss of substantial due process rights, or humanitarian need.

Expedited processing may be granted when the requester demonstrates a compelling need for the information and shows that the information has a particular value that would be lost if not processed on an expedited basis. A key word here is "demonstrates." It is, therefore, incumbent upon you to demonstrate that the requested records will serve an urgency purpose, and that they also will be meaningful in the sense that they will provide for a greater understanding of actual or alleged federal government activity on the part of the public-at-large than that which existed before such information was disseminated. Consequently, it must be clearly demonstrated that such information has a particular value that will be lost if not disseminated quickly. After careful consideration of your request, this Office finds that you have not clearly demonstrated how the information will lose its value if not processed on an expedited basis. For these reasons, your request for expedited processing is denied.

You should also know that we will be unable to respond to your request within the FOIA's 20 day statutory time period as there are unusual circumstances which impact on our ability to quickly process your request.

These unusual circumstances are: (a) the need to search for and collect records from a facility geographically separated from this Office and (b) the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue and will be worked in the order the request was received. Our current administrative workload is 1,340 open requests.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense, by writing directly to the Defense Freedom of Information Policy Office, Attn: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 13-F-0242, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Michael Bowers, FOIA Analyst
571-372-0421, Michael.Bowers@WHS.Mil
For Suzanne Council, Senior Advisor on behalf of
Paul J. Jacobsmeyer, Chief, Office Freedom of Information
Office of the Secretary of Defense and Joint Staff FOIA Request Service Center
<http://www.dod.mil/pubs/foi/>
1155 Defense Pentagon
Washington, DC 20301-1155

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Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit H



FOIA Request 13-F-0242: Response to the Refusal to Expedite Carol Rosenberg's December 31, 2012 FOIA Request

John Langford <john.langford@yale.edu>
To: Michael.Bowers@whs.mil
Cc: "Rosenberg, Carol" <crosenberg@miamiherald.com>

Wed, Jan 16, 2013 at 10:57 AM

January 16, 2013

Michael Bowers, FOIA Analyst

Office of the Secretary of Defense and Joint Staff

FOIA Request Service Center

1155 Defense Pentagon

Washington, DC 20301-1155

Dear Mr. Bowers:

I write on behalf of the Media Freedom and Information Access Clinic at Yale Law School, which represents *Miami Herald* reporter Carol Rosenberg in connection with her FOIA request of December 31, 2012. That request seeks the expedited release of "records sufficient to disclose the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as 'Continued Detention under the AUMF' in the November 2012 GAO report.^[1]"

Your January 7, 2013 email denying expedited treatment has been referred to me for response, and we hereby appeal the refusal to expedite.

As Ms. Rosenberg explained in making this request, expedited processing is called for by 28 C.F.R. § 286.4(d)(3)(ii) because the information she seeks is "urgently needed by an individual engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity." The information is highly relevant to public understanding of the work of the recently-created Periodic Review Boards, and we understand that these boards will begin their work at Guantanamo in the near future. Ms. Rosenberg is a reporter for a daily newspaper who has been covering the various military tribunals at Guantanamo, and her request involves "a breaking news story of general public interest." 28 C.F.R. § 286.4(d)(3)(ii)(A). Disclosure should properly be expedited.

We are particularly troubled not only by the refusal to expedite Ms. Rosenberg's straightforward request, but by the indication in your email that it will take more than the 20 days permitted, without expedition, to locate and disclose the requested list of a few dozen names. There should be no need for any lengthy process to "search for and collect

records from a facility geographically separated from this Office,” and then to engage in extended “consultation with one or more other agencies or DoD components” as your email describes. As explained in Ms. Rosenberg’s request, the office of Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy is believed to be a repository of the requested names, which we do not believe to be classified. We see no “unusual circumstances” that justify a prolonged process or require Ms. Rosenberg’s request to be placed at the bottom of your “complex processing” queue.

Ms. Rosenberg has demonstrated a “compelling need” for the easily-identifiable, non-burdensome list of names that she seeks, and she is entitled to expedited processing under DoD Regulation 5400.7-R. Please reconsider your decision to deny expedition and delay a response. If we do not hear from your Office within two weeks, we intend to take all appropriate further action on behalf of our client.

All future correspondence concerning Ms. Rosenberg’s request may be sent to me at the below address, or at john.langford@yale.edu. Thank you.

Very truly yours,

John Langford

Media Freedom and Information Access Clinic

Yale Law School

127 Wall St.

New Haven, CT 06511

(919) 619-9819

john.langford@yale.edu

cc: Mr. James Hogan, Defense Freedom of Information Policy Office

Ms. Carol Rosenberg

[1] U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (2012), *available at* <http://www.gao.gov/assets/660/650032.pdf>.



**FOIA Request 13-F-0242.Response to the Refusal to Expedite Carol Rosenberg's December 31,
2012 FOIA Request.docx**

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Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit I

13-F-0242 FOIA Request - Rosenberg, List of GTMO Detainees

Bowers, Michael D CIV WHS-ESD-FOID [michael.bowers@whs.mil]

Sent: Monday, January 28, 2013 2:42 PM

To: Langford, John

Cc: Council, Suzanne CIV WHS-ESD [Suzanne.Council@whs.mil]

John Langford
Media Freedom and Information Access Clinic
Yale Law School
127 Wall St.
New Haven, CT 06511

Dear Mr. Langford:

Even though we denied Ms. Rosenberg's request for expedited processing, we have initiated appropriate search for responsive records and will respond to your request when the results are known. Granting of request for expedition does not mean that we can guarantee that your request can be fulfilled by a certain date, as proper procedures in search and review must be followed. As well, there are unusual circumstances which impact our ability to quickly process the request - the records facility is geographically separated from this Office, and, the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. We appreciate your understanding.

Please do not hesitate to contact me with any questions you may have regarding the request.

Respectfully,

Michael Bowers, FOIA Analyst
571-372-0421, Michael.Bowers@WHS.Mil
For Suzanne Council, Senior Advisor on behalf of
Paul J. Jacobsmeyer, Chief, Office Freedom of Information
Office of the Secretary of Defense and Joint Staff FOIA Request Service Center
<http://www.dod.mil/pubs/foi/>
1155 Defense Pentagon
Washington, DC 20301-1155

-----Original Message-----

From: John Langford [<mailto:john.langford@yale.edu>]

Sent: Wednesday, January 16, 2013 10:57 AM

To: Bowers, Michael D CIV WHS-ESD-FOID

Cc: Rosenberg, Carol

Subject: 13-F-0242: Response to the Refusal to Expedite Carol Rosenberg's December 31, 2012 FOIA Request

January 16, 2013

Michael Bowers, FOIA Analyst
Office of the Secretary of Defense and Joint Staff
FOIA Request Service Center
1155 Defense Pentagon
Washington, DC 20301-1155

Dear Mr. Bowers:

I write on behalf of the Media Freedom and Information Access Clinic at Yale Law School, which represents Miami Herald reporter Carol Rosenberg in connection with her FOIA request of December 31, 2012. That request seeks the expedited release of "records sufficient to disclose the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as 'Continued Detention under the AUMF' in the November 2012 GAO report.[1]" Your January 7, 2013 email denying expedited treatment has been referred to me for response, and we hereby appeal the refusal to expedite.

As Ms. Rosenberg explained in making this request, expedited processing is called for by 28 C.F.R. § 286.4(d)(3)(ii) because the information she seeks is "urgently needed by an individual engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity." The information is highly relevant to public understanding of the work of the recently-created Periodic Review Boards, and we understand that these boards will begin their work at Guantanamo in the near future. Ms. Rosenberg is a reporter for a daily newspaper who has been covering the various military tribunals at Guantanamo, and her request involves "a breaking news story of general public interest." 28 C.F.R. § 286.4(d)(3)(ii)(A). Disclosure should properly be expedited.

We are particularly troubled not only by the refusal to expedite Ms. Rosenberg's straightforward request, but by the indication in your email that it will take more than the 20 days permitted, without expedition, to locate and disclose the requested list of a few dozen names. There should be no need for any lengthy process to "search for and collect records from a facility geographically separated from this Office," and then to engage in extended "consultation with one or more other agencies or DoD components" as your email describes. As explained in Ms. Rosenberg's request, the office of Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy is believed to be a repository of the requested names, which we do not believe to be classified. We see no "unusual circumstances" that justify a prolonged process or require Ms. Rosenberg's request to be placed at the bottom of your "complex processing" queue.

Ms. Rosenberg has demonstrated a "compelling need" for the easily-identifiable, non-burdensome list of names that she seeks, and she is entitled to expedited processing under DoD Regulation 5400.7-R. Please reconsider your decision to deny expedition and delay a response. If we do not hear from your Office within two weeks, we intend to take all appropriate further action on behalf of our client.

All future correspondence concerning Ms. Rosenberg's request may be sent to me at the below address, or at john.langford@yale.edu. Thank you.

Very truly yours,

John Langford
Media Freedom and Information Access Clinic
Yale Law School
127 Wall St.
New Haven, CT 06511
(919) 619-9819 <tel:%28919%29%20619-9819>
john.langford@yale.edu

cc: Mr. James Hogan, Defense Freedom of Information Policy Office
Ms. Carol Rosenberg

[1] U.S. Gov't Accountability Office, GAO-13-31, *Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United*

States (2012), available at <http://www.gao.gov/assets/660/650032.pdf>.

Carol Rosenberg v. United States
Department of Defense

Complaint Exhibit J

February 5, 2013

Defense Freedom of Information Policy Office
Attn: Mr. James Hogan
1155 Defense Pentagon
Washington, D.C. 20301-1155

Re: Freedom of Information Act Appeal by Carol Rosenberg of the Miami Herald; Request Number 13-F-0242

Dear Sir/Madam:

We represent *Miami Herald* reporter Carol Rosenberg concerning her December 31, 2012 Freedom of Information Act (“FOIA”) request, number 13-F-0242. By letter and email dated January 16, 2013, we wrote to appeal the Department of Defense’s (“DoD”) refusal to grant Ms. Rosenberg’s request expedited processing. At this time we further appeal the constructive denial by DoD of her straightforward FOIA request seeking a single piece of information: a list of the names of Guantanamo detainees whose Detainee Detention and Prosecution status is listed as “Continued Detention under the AUMF” in a November 2012 GAO report. This is a narrow request for a simple list of names and there is no proper reason why DoD has not responded to Ms. Rosenberg’s request within the 20-day statutory deadline.

I. Background

By letter dated December 31, 2012 (attached hereto as Exhibit A), *Miami Herald* reporter Carol Rosenberg requested records sufficient to disclose the names of all Guantanamo detainees whose Detainee Detention and Prosecution status is listed as “Continued Detention under the AUMF” in the November 2012 GAO report. Ms. Rosenberg requested expedited treatment of this request pursuant to 28 C.F.R. § 286.4(d)(3)(ii) because the records sought are urgently needed by an individual engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.

In an email from FOIA Analyst Michael Bowers to Carol Rosenberg dated January 7, 2013 (attached hereto as Exhibit B), Mr. Bowers informed Ms. Rosenberg that her request for expedited processing was denied. He also advised Ms. Rosenberg that the DoD would be unable to respond to her request within the 20 day statutory time period because of “the need to search for and collect records from a facility geographically separated from this Office and [...] the need for consultation with one or more other

agencies or DoD components having a substantial interest in either the determination or the subject matter of the records.”

By email and letter dated January 16, 2013 (attached hereto as Exhibit C), I wrote Mr. Bowers to both appeal DoD’s refusal to expedite Ms. Rosenberg’s December FOIA request and to object to Mr. Bowers’ indication that the DoD would not respond within the statutory deadline.

Mr. Bowers responded by email on January 28, 2013 (attached hereto as Exhibit D) advising us that although it denied Ms. Rosenberg’s request for expedited processing, the DoD has initiated a search for responsive records. Mr. Bowers also reiterated that there are unusual circumstances that impact the DoD’s ability to quickly process Ms. Rosenberg’s request: “the records facility is geographically separated from this Office, and, the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records.”

As of today’s date, no documents have been received by Carol Rosenberg in response to her December 31, 2012 FOIA request to the DoD.

II. Basis for Appeal

DoD regulations require prompt action on FOIA requests. *See* DoD Directive 5400.7 C1.5.4.1. Under the Freedom of Information Law, documents are to be produced within 20 days. *See id.* at C.5.2.5.1.

DoD may properly withhold the information sought by AP only if it demonstrates “by specific and detailed proof that disclosure would defeat, rather than further, the purpose of the FOIA.” *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (citation omitted). The basic policy of the Act is to compel disclosure, and claims of exemption must therefore be supported with “specificity and [in] detail.” *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. United States Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (alteration in original). To withhold information, DoD must provide both the factual support and “the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.” *Mead Data Cent.*, 566 F.2d at 261.

DoD has not produced any documents and has not claimed any exemption to disclosure. DoD’s failure to grant expedited process and to produce the requested records is improper. DoD’s refusal to produce the requested records is particularly improper given the time-sensitive nature of Ms. Rosenberg’s request and the important news value of the documents sought.

Although we have already appealed DoD’s refusal to grant Ms. Rosenberg’s request expedited processing, *see* Exhibit C, we reiterate that the Freedom of Information Act directs that expedited treatment should be provided when a request is “made by a

person primarily engaged in disseminating information" and there is an "urgency to inform the public of actual or alleged Federal Government activity." 5 U.S.C.A. § 552(a)(6)(E)(v)(II). DoD regulations implementing 5 U.S.C.A. § 552(a)(6)(E)(v)(II) state that a request will be granted expedited processing "after the requester requests such and demonstrates a compelling need for the information." 28 C.F.R. § 286.4(d)(3). DoD regulations specify that "compelling need [] means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity." 28 C.F.R. § 286.4(d)(3)(ii). DoD regulations further specify that "[r]epresentatives of the news media would normally qualify as individuals primarily engaged in disseminating information," *id.*, and that "urgently needed" ordinarily "means a breaking news story of general public interest," 28 C.F.R. § 286.4(d)(3)(ii)(A). As we have already argued, *see* Exhibit C, Carol Rosenberg is a reporter for the *Miami Herald* seeking information about a breaking news story concerning Guantanamo detainees and thus her request clearly satisfies the FOIA standard for expedited processing as implemented by DoD regulations.

Here, not only has DoD failed to provide expedited treatment, it has failed to comply with its ordinary obligations under FOIA to produce requested documents within 20 days.

Pursuant to DoD regulations, appeal procedures are available to FOIA requesters for "any *determination found to be adverse in nature by the requester.*" DoD Directive 5400.7, C5.3.1 (emphasis in original). The DoD's refusal to grant expedited processing and failure to produce the records or claim any exemption is adverse to Ms. Rosenberg, and as such, Ms. Rosenberg hereby appeals the DoD's "constructive denial" of her December 31, 2012 FOIA request. *See* DoD Directive 5400.7 C.5.4.1 (noting that "not providing a response [sic] determination to a FOIA request within the statutory time limits" is an adverse determination).

III. Request for Relief

For the foregoing reasons, we respectfully submit that DoD has constructively failed to meet its legal obligation to disclose the records and information requested by Carol Rosenberg on December 31, 2012.

Again we advise you that the information is sought in connection with reporting by Ms. Rosenberg on a continuing news story of great public interest. Therefore we respectfully request expedited treatment of this appeal. In any event, we trust that we will receive your decision within 20 business days as required by DoD Directive 5400.7, C.5.3.3.2 and 5 U.S.C § 552(a)(6)(A)(ii).

Thank you for your prompt attention to this matter.

Very truly yours,

John Langford

Enclosures

cc: David Schulz, Esq.